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United States
Circuit Court of Appeals
For the Ninth Circuit.

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2357

ULTRA-VIOLET PRODUCTS, INC., a corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Transcript of the Record

Upon Petition to Review and Set Aside Order of the
Federal Trade Commission

FILED

SEP - 8 1943

PAUL P. O'BRIEN,

CLERK

No. 10218

United States
Circuit Court of Appeals
For the Ninth Circuit.

ULTRA-VIOLET PRODUCTS, INC., a corporation,

Petitioner,

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Transcript of the Record

Upon Petition to Review and Set Aside Order of the
Federal Trade Commission

M. J. Law Library
19 Books

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America
Before Federal Trade Commission

Docket No. 4407

In the Matter of

ULTRA-VIOLET PRODUCTS, INC., a corporation.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ultra-Violet Products, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent, Ultra - Violet Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 6158 Santa Monica Boulevard, in the City of Los Angeles, State of California. It is now, and for more than two years last past has been, engaged in the manufacture of a device designated as "Life Lite" and in the sale and distribution of such device in commerce between and among the various states of the United States and in the District of Columbia. Said device

is a quartz lamp of the so-called "cold" type, whereby a mercury arc is burned in quartz. It is sold, designed and intended for home use by the lay individual as an artificial means of obtaining the ultraviolet rays of natural sunlight, and for the alleged prevention, treatment and alleviation of various ailments, diseases and abnormal conditions of the human body. [1*]

Paragraph Two: Respondent, being engaged in business as aforesaid, causes and has caused its said device, "Life Lite", when sold, to be transported from its said place of business in the State of California to purchasers thereof located in states of the United States other than the State of California, and in the District of Columbia. Respondent maintains, and at all the times herein mentioned has maintained, a course of trade in said device in commerce between and among the various states of the United States and in the District of Columbia.

Paragraph Three: In the course and conduct of its aforesaid business, the respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning its said product by the United States mails, and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and respondent has also disseminated and is now disseminating and has caused and is now causing the dissemination of, false adver-

* Page numbering appearing at foot of page of original certified Transcript of Record.

tisements concerning its said product, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of its said product in commerce, as commerce is defined in the Federal Trade Commission Act. Among, and typical of, the false, misleading and deceptive statements and representations contained in said false advertisements, disseminated and caused to be disseminated, as hereinabove set forth, by the United States mails, by advertisements in newspapers and periodicals, and by other advertising literature, are the following:

“Life Lite ultra-violet rays clear up many of the chronic skin disorders which have failed to respond to other methods of treatment Most infections of the skin respond quickly to the germ killing effects of the rays. Furthermore, they stimulate the skin tissue to build a high degree of disease resistance.” [2]

“Ultra-Violet helps to set up a chemical reaction that keeps the blood stream in balance. It aids in overcoming a deficiency of either white or red blood corpuscles . . . As well as deficiencies of the red coloring matter that is so important as an oxygen carrying agent. Thus, this tonic effect on the blood not only builds direct resistance to infection but also stimulates the endocrine glands that are so vital to health.”

“The chemical action of ultra-violet rays soothes the nerve endings in the skin and alleviates many internal conditions. The anti-

acid or alkalinizing effect of ultra-violet rays, plus their ability to increase the general resistance, help to correct many forms of illness."

Build Better Health with Life Lite . . . A full quota of sunlight whether obtained from natural or artificial sources means a better functioning of the human body. It helps build resistance against disease, improves metabolism and increases capacity for work or play."

"Many disorders of the catarrhal type, such as asthma, hay-fever, bronchitis, colds, sinus trouble, and discharge from the ears, are corrected more rapidly if daily treatment is given with the cold ultra-violet ray lamp."

"Many skin diseases, where fungi are present, such as barber's itch, ringworm, and impetigo, also disappear when the proper dosages of the rays are used . . . Great improvement in cases of athlete's foot will quickly be noted."

". . . In acne, eczema, psoriasis, shingles and erysipelas, ultra-violet can often be used with marked benefit. The ultra-violet rays destroy germs and also hasten the growth of new, clean tissue . . ." [3]

"Life Lite is indispensable for the home treatment of a great many skin diseases and for relieving many types of illness. It is without doubt the finest means of building up the general resistance, overcoming low vitality, and quickening convalescence of any known natural treatment."

"Patients with anemia should receive ultra-violet light treatments in addition to dietary changes. The light-ray applications have a tendency to increase both the hemoglobin and red corpuscles of the blood."

"You will find our quartz ultra-violet lamps to be the safest and most efficient on the market. The intensity is correctly regulated so that there is no danger of serious over-exposure."

"These rays are absolutely necessary to vigorous, normal existence as well as a powerful aid in healing disease. It has been shown that the ultra-violet rays are one of the main factors which produce improved tone, increased resistance and better mental reaction. They tone up the nervous system and induce restful sleep by a regulatory influence on the metabolism in all cases showing a calcium and phosphorus deficiency."

Quartz ultra-violet rays normalize body chemistry! Life Lite rebuilds your resistance to colds, increases vitality and heals most skin diseases."

"Skin Diseases, acne, eczema, psoriasis, sores, ulcers, infections, etc. Life Lite quartz ultra-violet lamps heal most skin diseases safely, quickly and easily at home." [4]

"Get your quota of sunlight with Life Lite . . . clear up most of your chronic skin disorders . . . build resistance against disease . . . and relieve pain. Sufferers from psoriasis,

acne, eczema, ulcers, and impetigo have obtained noticeable improvement after consistent use of Life Lite."

Paragraph Four: By the use of the above and similar representations not set out herein respondent has directly and by implication represented to the general public that its said device designated "Life Lite" is a sun lamp; that it is safe for use in the home for self-treatment without the supervision of a qualified physician; and that it will give benefits to the skin and to the general health of the individual comparable to that given by natural sunlight. Respondent has further represented to the general public, as aforesaid, that the use of said device provides a cure, remedy or competent and adequate treatment for chronic, infectious and bacterial skin diseases and ailments, as well as those of fungus origin, asthma, hay-fever, bronchitis, colds, sinus trouble, discharges from the ears, barber's itch, ringworm, impetigo, athlete's foot, acne, eczema, psoriasis, shingles, erysipelas, anemia, sores and ulcers, and that it will give relief in all of such conditions, diseases and ailments. Respondent has also represented to the general public, as aforesaid, that the use of said device stimulates the tissues of the skin; that it builds up in the body resistance to disease; that it produces a chemical reaction that keeps the blood stream in balance; that it aids in overcoming a deficiency of either white or red corpuscles; that it produces a tonic effect upon the blood; that it builds up the body's resistance to

infection; that it stimulates the endocrine glands; that it quiets and soothes the nerves, especially the nerve endings in the skin; that it acts as an anti-acid and has an alkalizing effect upon the body; that it improves metabolism; that it makes the body strong, increases vitality, and builds new tissue; that it improves the general tone of the body and improves mental reactions; that it tones up the nervous system and induces sleep; that it normalizes body chemistry and that it relieves pain. [5]

Paragraph Five: Ultraviolet rays are measured in angstrom units. The ultraviolet rays emitted from natural sunlight range in wave lengths from 2800 to 3150 angstrom units. A lamp which emits ultraviolet rays within this range is properly understood and designated by members of the medical profession generally as a sun lamp. Lamps which emit ultraviolet rays of less than 2800 angstrom units are considered by the medical profession generally as therapeutic lamps rather than as sun lamps for the reason that the rays emitted therefrom possess bactericidal properties and are not comparable to the rays emitted by natural sunlight. Such therapeutic lamps are not suitable for the same type of uses as are sun lamps and are not suitable for home use for therapeutic purposes without the supervision of a trained and skilled operator because of the danger of overexposure and severe burns. Respondent's lamp is in the category of therapeutic lamps by reason of its emission of ultraviolet rays of approximately 2540 angstrom units.

Respondent's device will not give benefits to the

skin and to the general health of the individual comparable to that given by natural sunlight for the reason that the ultraviolet rays emitted therefrom are not, in turn, comparable to the ultraviolet rays emitted by natural sunlight. The therapeutic value of respondent's device is limited to the possible destruction of bacteria when present on the surface of the skin and it would be of no value in the treatment of chronic infections, asthma, hay-fever, bronchitis, colds, sinus trouble, discharges from the ears, barber's itch, ringworm, impetigo, athlete's foot, acne, eczema, psoriasis, shingles, erysipelas, anemia, sores or ulcers. Said device has little or no value in the treatment of bacterial skin disease or those of fungus origin because of its inability to penetrate the layers of the skin to reach such germs or organisms which are not found generally on the surface of the skin. Furthermore, the use of said device will not stimulate the tissues in the skin or build up resistance in the body against disease. Said device will not produce a chemical reaction in the body, keep the blood stream in balance, or aid in overcoming a deficiency of the white or red blood corpuscles, nor does it produce a tonic effect on the blood. It does not build up the body's resistance against infection, stimulate the endocrine glands or quiet and soothe the nerves or the nerve endings in the skin. Said device does [6] not act as an anti-acid or have an alkalizing effect upon the body. The use of said device does not result in an improvement in the process of metabolism nor does it make the body strong or increase vitality or build new

tissue. It does not improve the general tone of the body or improve mental reactions. The use of said device does not tone up the nervous system, induce sleep, normalize the body chemistry, or relieve pain.

Paragraph Six: In addition to the false and misleading statements hereinabove set forth, the respondent is also engaged in the dissemination of false advertisements as aforesaid in that said advertisements fail to reveal facts material in the light of the representations contained therein and fail to reveal that the unsupervised use of respondent's device for therapeutic purposes by persons not trained in the operation of such device and not skilled in the diagnosis, analysis and methods of treatment of diseases may result in severe burns and other serious and irreparable injury to health.

Paragraph Seven: The use by the respondent of the foregoing false, deceptive and misleading statements, representations and advertisements disseminated as aforesaid with respect to the therapeutic value of its said device has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements, representations and advertisements are true and induces a portion of the purchasing public because of such erroneous and mistaken belief to purchase said device.

Paragraph Eight: The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in com-

merce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, the Premises Considered, the Federal Trade Commission, on this 7th day of December, A. D., 1940, issues its complaint against said respondents.

NOTICE

Notice is hereby given you, Ultra-Violet Products, Inc., a corporation, respondent herein, that the 10th day of January, A. D. 1941, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at [7] which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from

the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true, Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without [8] further evidence, or other intervening procedure, to find such facts to be true, and if in the judgment of the Commission such facts admitted constitute a violation of law or laws as charged in the complaint, to make and serve findings as to the facts and an order to cease and desist from such violations. Upon applica-

tion in writing made contemporaneously with the filing of such answer, the respondent, in the discretion of the Commission, may be heard on brief, in oral argument, or both, solely on the question as to whether the facts so admitted constitute the violation or violations of law charged in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 7th day of December, A. D. 1940.

By the Commission.

[Seal] OTIS B. JOHNSON,
Secretary. [9]

[Title of Commission and Cause.]

ANSWER TO COMPLAINT

Comes now the respondent in the above entitled complaint, The Ultra-Violet Products, Inc., a corporation and answers as follows:

Paragraph One: Admits the Ultra-Violet Products, Inc., is a corporation organized, existing in, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 5205 Santa Monica Boulevard, in the City of Los Angeles, State of California. It admits that it is now, and for more than the two years last past has been engaged in

the manufacture of a device designated as "Life Lite", and in the sale and distribution in commerce between and among the various states in the United States and in the District of Columbia. Admits also that said device is a quartz lamp of the so-called "cold" type, and that it is sold, designed and intended for home use by and for the purposes designated in Paragraph One of the above numbered docket.

Paragraph Two: Respondent admits being engaged in the business as aforesaid, and of causing and of having caused its said device, "Life Lite", when sold, to be transported from its said place of business in the state of California in the manner and in the terms outlined in Paragraph Two of the complaint.

Paragraph Three: Respondent admits that in the course and conduct of its aforesaid business it has disseminated and is now disseminating and has caused and is now causing the disseminating, advertisements concerning its said products by the United States mails, and by various other means in commerce as defined in the Federal Trade Commission Acts. And respondent further admits that the sentences and paragraphs quoted in the last eight lines of Page 2 and in all of the lines on Page 3, and 4, and the first [10] seven lines of Page 5 of the above entitled docket, are quotations lifted from various advertisements disseminated by the respondent, but that each quotation outlined in the complaint, being separated from the balance of the text cannot, in each separate case, be judged

as it stands alone. Respondent denies that, as alleged in Paragraph Three of the complaint, said advertisements were, or are, false, misleading and deceptive.

Paragraph Four: Respondent admits that by use of the advertisements set forth in Paragraph Three of this docket and by the use of similar representations not set forth therein, it has by implication, represented to the general public that its said device, herein designated as "Life Lite", was of the type and for the purposes set forth in Paragraph Four.

Paragraph Five: Respondent admits that, as set forth in the first paragraph of Paragraph Five of the complaint that the lamp sold by the respondent emits Ultra-Violet rays of approximately 2540 angstrom units. As for the other allegations set forth in the first paragraph of Paragraph Five, the respondent cannot answer.

Respondent denies all of the allegations set forth in the second or last paragraph of Paragraph Five in the complaint and sets forth, rather, that respondent's device will give benefits to the skin and to the general health of the individual in the manner and within the therapeutic limits outlined in the respondent's advertising. Respondent denies that the value of their device is limited to the possible destruction of bacteria when present on the surface of the skin or that it would be of no value in the treatment of the various ailments, infections and diseases set forth in the second paragraph of Paragraph Five. Respondent denies that its device

is incapable of penetrating the layers of the skin sufficiently to reach such germs and organisms which are not generally found on the surface of the skin. Respondent furthermore alleges that this device will stimulate the tissues in the skin and will build up resistance in the body against disease, will produce a chemical reaction in the body and do the other and various specific functions set forth in this paragraph.

Paragraph Six: Respondent denies that, as set forth in this paragraph, that said advertisements failed to reveal facts material in the light of the representation contained therein and failed to reveal that the unsupervised use of respondent's device for therapeutic purposes by persons not trained in the operation of said device, and not skilled in the diagnosis, analysis and the methods of treatment of diseases, may result in severe burns, and other serious and irreparable injuries to health. On the contrary, respondent claims that the user of respondents device is automatically protected against over-exposure by means of a timing mechanism contained in the device and by warnings and instructions contained in the device. [11]

Paragraph Seven: Respondent denies all the allegations set forth in this paragraph.

Paragraph Eight: Respondent denies all the allegations set forth in this paragraph.

Wherefore, the premises reconsidered the Ultra-Violet Products, Inc., asks that this complaint be vacated.

SECOND ANSWER TO COMPLAINT

The respondent, again admitting its corporate title, existence, and place of business as set forth in the first answer of this complaint comes now and as a separate answer, further sets forth:

That all of the statements, representations, and claims made in its advertisements in the period mentioned in the above numbered docket were made in good faith and on the basis of investigation and facts revealed in technical and scientific literature available to the respondent, and for the purposes of substantiating these statements, representations and claims, cites the following nineteen exhibits, together with the bibliography appended to each exhibit, and each of which exhibits, together with the bibliography thereto, is made part of this second answer.

Exhibit 1:—The Use of “Cold Quartz” Light in General Practice, Archives of Physical Therapy, X-Ray, Radium, February, 1933, Pages 72 to 75 Inc.

Exhibit II:—Further Studies in Ultraviolet Treatment of Erysipelas, Archives of Physical Therapy, X-Ray, Radium, September, 1937, Pages 574 to 575.

Exhibit III:—“Cold Quartz” Ultra-Violet Orificial Irradiation, Archives of Physical Therapy, X-Ray, Radium, February, 1932 Vol. XIII, Pages 82 to 86.

Exhibit IV:—Influence of Ultraviolet on the Role of Oxygen in Mineral Metabolism and Immunity

Reactions, Archives of Physical Therapy, X-Ray Radium, April, 1933, Pages 222 to 224.

Exhibit V:—Ultraviolet Radiation of Erysipelas, Archives of Physical Therapy, X-Ray, Radium, June, 1937, Pages 363 to 364. [12]

Exhibit VI:—Physical and Therapeutic Considerations of the Mercury Spectrum, Archives of Physical Therapy, X-Ray, Radium, June, 1933, Pages 356 to 359.

Exhibit VII:—Dr. Albert Bachem, Ph.D., College of Medicine, University of Illinois, Archives of Physical Therapy, XIII, Pages 614 to 619.

Exhibit VIII:—Ultraviolet Irradiation in Skin Diseases, Archives of Physical Therapy, March, 1940, Page 188.

Exhibit IX:—Rational Ultraviolet Therapy and Skin Sensitometry, Archives of Physical Therapy, Nov., 1939, Page 678.

Exhibit X:—Genital Tuberculosis, The Journal of the American Medical Association, October 7, 1939, Vol. 113, No. 15, Page 1392.

Exhibit XI:—Experiences With a New Type of Mercury Glow Lamp, Archives of Physical Therapy, Nov., 1938, Pages 661 and 662.

Exhibit XII:—The Physical Aspects of Ultraviolet Therapy, The Journal of the American Medical Association, July 30, 1938, Vol. 111, No. 5, Pages 419 to 422.

Exhibit XIII:—Clinical Aspects of Ultraviolet Therapy, The Journal of the American Medical Association, July 23, 1938, Vol. 111, No. 4, Pages 312 to 316.

Exhibit XIV:—Precise Evaluation of Ultraviolet Therapy in Experimental Rickets, *New England Journal of Medicine*, Vol. 216, No. 4, Pages 165 to 169, Jan. 28, 1937.

Exhibit XV:—Production of Erythema and Tan by Ultraviolet Energy, *The Journal of the American Medical Association*, June 17, 1939, Vol. 112, No. 24 — Pages 2510 to 2511.

Exhibit XVI:—Archives of Physical Therapy, X-Ray, Radium (Official Publication American Congress of Physical Therapy), *Archives of Physical Therapy, X-Ray, Radium*, Feb., 1933, Pages 108 to 109.

Exhibit XVII:—The Action of Ultraviolet Radiation on Dermatophytes, *Journal of Cellular & Comparative Physiology*, Vol. 13, No. 3, Pages 391 to 402, June, 1939.

Exhibit XVIII:—Ultraviolet Irradiation in Skin Diseases, *The British Journal of Physical Medicine*, Vol. 2, No. 11, Nov., 1939.

Exhibit XIX:—Ultraviolet Irradiation in Skin Diseases, *The British Journal of Physical Medicine*, Vol. 2, No. 12, Dec., 1939. [13]

Wherefore, reconsidering the premises in the light of the material facts in evidence in the nineteen exhibits, the respondent, the Ultra-Violet Products, Inc., ask that the above entitled complaint be vacated.

THIRD ANSWER TO COMPLAINT

The respondent, the Ultra-Violet Products, Inc. doing business in, as, and where mentioned in Para-

graph One of the first answer to the above numbered docket further sets forth as a separate answer to the complaint as follows:

That the Ultra-Violet Products, Inc. is desirous of entering into and signing stipulations with the Federal Trade Commission, covering the actions complained of in the above numbered docket for the purpose of ceasing and desisting from any further dissemination of such statements, representations and claims as, in the light of present day scientific knowledge, may be contrary to fact.

The respondent further sets forth that it has at no time, within the period mentioned, disseminated or caused to be disseminated in commerce as defined by the Federal Trade Commission Act any statements which were not to the best of its knowledge and belief, true. All such statements made to induce the purchase of its product, "Life Lite", were made in good faith, after reasonable assurance and investigation, and the respondent is, therefore, desirous of an opportunity of presenting briefs in substantiation of those said statements.

Therefore: The respondent, The Ultra-Violet Products, Inc., petitions that stipulations be drawn covering those alleged statements made by it and submitted for signature, and that the above numbered docket be closed by stipulation.

In Witness Whereof, The Ultra-Violet Products, Inc., has caused their answers to the above entitled docket to be signed by its president and caused

its official seal to be affixed thereto at Los Angeles, California on this 10th day of January, A. D. 1941.

THOMAS S. WARREN

ULTRA-VIOLET PRODUCTS,
INC.

President [14]

[Title of Commission and Cause.]

Exhibits 1 to 19 Inc. Supporting Second Answer.
[15]

EXHIBIT I

The Use of "Cold Quartz" Light in General
Practice * **

by

Harold M. F. Behneman, M.S., M.D.

San Francisco

taken from

Archives of Physical Therapy, X-Ray, Radium
February, 1933 — Pages 72 to 75 Inc.

"We have adequate proof that the rays most potent in pigmentation are between 2900 and 3300 angstrom units. Shorter rays such as those that emanate from this type of lamp, are erythema producing, and not pigmenting except in rare cases. There are two schools of thought as regards the value of pigmentation. I am of the belief that pigmentation is a defense mechanism by which the body shuts out further absorption, and that it is in no sense completely necessary for benefit. This is purely from clinical evidence, but I find support

in many other workers. Dr. Gordon Hugh published the mortality rates of 232 patients with various grades of pigmentation, suffering from tuberculosis of the spine, hips and knees. In the very good pigmenters, the mortality rate was highest, 16 per cent dying; 15 per cent of the good pigmenters died, while only 10 per cent of the slight pigmenters, and 9 per cent of the non-pigmented patients succumbed. Leonard Hill, W. T. Bovie, and C. M. Sampson agree with this in general.

“With the knowledge of these and other workers, plus the accepted fact of germicidal potency around 2540 angstrom units, it was felt that a fair appraisal of this generator could best be made in working first with pathological lesions such as ulcers, open wounds, fissures, sinuses, burns, endocervicitis, Vincent’s infection, etc. The dosage was measured by the erythema produced adjacent to the lesion. It is certainly the most impartial method of measuring or insuring effective therapeutic action.

“Too much of actinic therapy has been empirical in nature, but it was justified because of its beneficial results. In the past, much stress has been laid on the photochemical reaction or vitamin D production of light, even though the treatment of rickets was really a minor division of phototherapy. Our many cures of malignant ulcers, sinuses, etc. have not been due to vitamin D production, nor to the antirachitic action of light, but still we used these factors as standards in evaluating different lamps. It is logical and refreshing to find Coblentz

concluding, "it seems natural to use the erythema instead of the antirachitic or photochemical action as a basis of standardization. ⁽²⁾ Using that as a standard, the radiant flux and the time for producing a minimum perceptible erythema, have been determined." ⁽⁴⁾

.....

"Use was made of the advice and experience of other workers. Nugent ⁽⁹⁾ reported on 2572 treatments in the Chicago Eye, Ear, Nose and Throat Hospital, with gratifying results. Caulk and Ewerhardt ⁽¹⁰⁾ [16] have successfully irradiated the interior of the bladder for tubercular ulcers, with a special applicator designed by them. Lawrenz ⁽¹¹⁾ and Brady ⁽¹²⁾ are two of many in the dental field who have stressed the importance of and success with properly indicated and constructed radiation. Beckwith ⁽¹³⁾ reported on the bactericidal effects of this type of radiation. In a personal communication, Dr. Cora Smith King, ⁽¹⁴⁾ director of Physical Therapy in the Hollywood, Calif., Hospital, has reported on the antirachitic value of the lamp, as used there and in the Children's Hospital, Clinical results have been encouraging and interesting, in that cases of rickets improved or were cured in about half the exposure required from hot burner quartz lamps. The results in osteomyelitis were still more gratifying, as one realized that about one-third the exposures were necessary for response with this generator. This, with my own findings is certainly conclusive evidence of the fact that its greatest value is its germicidal potency.

Clinical Evaluation of Cold Quartz Generators

"I can only very briefly outline the results of our work thus far, because of the limited time allotted to this report. Case histories are available for those interested. I realize the series are not very large in each case, but it is the constancy of results which is important. The work ahead is unlimited and the possibilities in the field of radiant energy are great. The specific instances in which the Cold Quartz has been properly evaluated are as follows:

"Sluggish Ulcers, particularly varicose ulcers"

"Burns"

"Endocervicitis"

"Fistulas and Rectal Ulcers"

"Vincent's Infection (Trench Mouth)"

"Acne"

"Boils and Carbuncles"

"Nasal Antrum Disease With Sinus Involvement"

"Lesions of the Urinary Tract"

*Read at the Eleventh Session of the American Congress of Physical Therapy, New York, September 8, 1932.

**From the Department of Medicine, University of California Medical School.

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EXHIBIT I-A

Pages 76-77

Discussion

“Dr. Disraeli Kobak (Chicago): I know of no more graphic illustration to picture the present situation which confronts both the physician and manufacturer in regard to their scientific exploitation of so-called Cold Quartz light than the trite expression, “trial and tribulation.” Both have experienced disappointments, elations and unjust criticisms in their attempt to demonstrate a new and improved apparatus of therapeutic and biological constructive possibilities. To demonstrate these possibilities or impossibilities it was necessary to break through the conservative crust of an orthodox profession and of opinions that were counter to the belief in this accomplishment. It is therefore to the credit of men like Hibben and in this instance, Behneman, who were adventurous to ride against the tide of fixed opinion and demonstrate a new innovation in ultraviolet therapy. To accomplish the purposes of the present investigation it was necessary to face criticism that he was prone to relinquish established facts for new possibilities; in other words to go counter to that classical couplet which admonishes to: [18]

‘Be not the first to cast the old aside

Nor yet the last by whom the new is tried.’

—a couplet which contains more rhyme than reason, and never has been part of the litany of the pioneer, the research worker, nor the leader of a new endeavor.

To demonstrate that Cold Quartz generators had a legitimate place in conservative medical practice it was necessary to prove beyond doubt that their physical and biological characteristics were similar to the accepted bands of radiation inherent in other artificial sources. On theoretical grounds it was difficult for the students of radiation therapy to orient themselves to this new type of radiation until certain of the categories associated with its reactions were proved. These were its erythemogenic qualities, its bactericidal properties and clinical effects. Dr. Behneman is to be highly commended for demonstrating similar therapeutic possibilities with Cold Quartz radiation which should stimulate others to similar efforts." [19]

EXHIBIT II

Further Studies in Ultraviolet Treatment of Erysipelas*

Miland E. Knapp, M.D.

Minneapolis, Minnesota

taken from

Archives of Physical Therapy, X-ray, Radium

September, 1937 - Pages 574-575

Conclusions

"1. Ninety-one cases of erysipelas treated by

*Read at the Mid-Western and Southern Sectional Meeting of the American Congress of Physical Therapy, St. Louis, Missouri, March 9, 1937.

ultraviolet alone are added to the previous reports from the Minneapolis General Hospital. This enlarges the entire series of 510 cases.

"2. Ultraviolet radiation has given consistently good results over a period of eight years.

"3. The complications and deaths are discussed.

"4. Ultraviolet seems to be particularly useful in reducing the mortality among small children."

EXHIBIT II-A

Discussion

"Dr. J. G. Jenkins (Temple, Texas): Dr. Knapp and I are very much in accord on the treatment of erysipelas. For the last few years we have been using ultraviolet, and so far we have found that it is much more satisfactory than the old method. Of course, we use the cold compresses, and we use some serums. I remember back when we used ichthyol, probably for the psychic effect of the color. I doubt if we got much results from it. In those days the cases would run for several weeks, and the convalescence was very slow. But since we have been using ultraviolet we find that the cases respond much more rapidly and that the period of convalescence is very short. The patients are allowed to leave the hospital in much less time.

"I think Dr. Knapp is correct when he says that it is necessary to use heavy dosage * * * *"

EXHIBIT III

“Cold Quartz” Ultra-Violet Orificial Irradiation*

by

Oscar B. Nugent, M.D.

Chicago

From the Ophthalmologic Department of the
Chicago Eye, Ear, Nose and Throat Hospital
taken from

Archives of Physical Therapy, X-ray, Radium
February, 1932 Vol. XIII, Pages 82-86

“It is obvious, even to the casual thinker, that the ‘cold quartz’ orificial tube would be a great advantage over other forms of ultra-violet ray apparatus, and the ease with which the source can be carried in close proximity to the affected parts, is also more than attractive in nose affections. Acne rasacea, chronic atrophic rhinitis, septal ulcers and ethmoiditis have been benefited by its application.

“The duration of treatment with the cold quartz orificial apparatus is from twenty seconds to three minutes, the average treatment being from one-half to one minute.

“In the Chicago Eye, Ear, Nose and Throat Hospital we have treated with the cold quartz orificial tube 1028 patients during the last five months. This involved 2572 treatments or an average of two and one-half treatments per patient. The range of treatments was from one to seventeen. The following table shows the number of patients treated in the various departments:

"Mouth	14
Eye (Exclusive of all corneal ulcers which are treated with the Hirschfeld Radiant Lamp)	101
Ear	380
Nose	432
Throat (Including treatments to the lar- ynx)	101

"Many of the above patients were treated with the cold quartz only, and many received other treatments at the same time. The results were, on the whole, much more gratifying than we had expected. Only eight cases were unsatisfactory. Of these eight, six patients should never have been treated with ultraviolet rays as their condition was not such as would respond to this treatment.

"In some cases we have only a notation that the condition had improved, the patient not having returned for further and complete treatment. In a fair percentage of these cases we are justified in assuming that the condition was cured. There are some, especially those who received only one treatment, of whom we have no account as to the results. But in those cases in which we were privileged to follow the patients through the entire course the results were very gratifying. [21]

Summary

"The 'cold quartz' orificial apparatus has demonstrated to us that it is superior to all other forms of ultraviolet irradiation apparatus in treatment of affections in cavities, and small areas on the body surface.

"It is unusually well adapted for the treatment of diseases of the eye, ear, nose and throat." [22]

EXHIBIT IV

Influence of Ultraviolet on the Role of Oxygen In Mineral Metabolism and Immunity Reactions*

by

G. J. Warnshuis, M. D.

Milwaukee

taken from

Archives of Physical Therapy, X-ray, Radium

April, 1933 - Pages 222 to 24

"The discovery of Vitamin D and its relationship to ultraviolet has been a great boon in supplying a rational explanation of the effects produced by ultraviolet radiation, both clinically and in animal studies. Some of the effects of ultraviolet, such as the action on mineral metabolism, blood platelet formation, and body growth, can be duplicated by administration of Vitamin D, but not in any case with the same positive and rapid response. (9, 10, 11) On the other hand, clinical observation shows that response to ultraviolet includes many reactions that are not influenced by Vitamin D feeding. Increased tone of the musculature, decided improvement of the appetite and intestinal peristalsis, mental invigoration, increased resistance to infection, improved endocrine function, correction of dyscra-

*Read at the Eleventh Annual Session of the American Congress of Physical Therapy, New York, September 6, 1932.

sias and allergy, all of these are frequently demonstrated so strikingly that it would appear as though every reaction of cell chemistry had been energized by the irradiation.

“The proof that such acceleration of oxidation and reduction reactions does take place apart from and in addition to any effects that may be attributed to Vitamin D activation is not lacking. V. Hofnagel in spectroscopic examinations of 400 cases of tuberculosis in children and 100 cases of early tuberculosis in war prisoners demonstrated a definite increase in activated oxygen in the blood. 5. A greater excretion of chlorides in the urine indicating a reduction in acidosis has been shown to follow exposure to ultraviolet.

“Although increase in the basal metabolism rate following ultraviolet radiation has been disputed, we have demonstrated, at least, a temporary change immediately after irradiation.

“The studies of Leonard Hill on infusoria as well as those of Carl Sonne and of Gottschalk (3) and Nonnenbruch on frogs establish the fact that in cold blooded organisms, oxidation is increased by ultraviolet radiation.

“In the last analysis, immunity reaction, bacteriolysis, are nothing else than a process of oxidation and reduction. A number of infectious diseases, especially tuberculosis, pertussis and erysipelas have been favorably influenced by ultraviolet rays. Increased antibody formation (2) and bactericidal power (14) have been demonstrated experimentally. Pertinent to this point is the fact that the tincture

guaiac and benzidine test for occult blood depends on the oxidase contained in the leucocytes and red cells of the blood. [23]

“The increased phagocytosis following ultraviolet irradiation and the improved state of resistance to bacterial invasion, resulting from regular exposure of the body to these rays, finds the most logical explanation in the influence on immunity reactions of a greater chemical activity of the oxygen contained in the blood and tissues. Additional support for this theory may be found in the well known sensitivity of bacteria to nascent oxygen.

“Another observation yielding the impression that there is a direct relationship between calcium metabolism and the state of oxidation lies in the fact that many cases of allergic sensitization are characterized by a deficiency of calcium. In such cases the improvement in symptoms following ultraviolet irradiation is proportionate to the degree of calcium deficiency (Brown and Hunter). The frequent association of allergy and calcium deficiency would point to a common cause, viz., suboxidation.”

References

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EXHIBIT V

Ultraviolet Radiation of Erysipelas*

by

J. G. Jenkins, M.D.

Temple, Texas

taken from Archives of Physical Therapy, X-ray,
Radium June, 1937 pp 363-4

Technic

"I always maintain the quartz mercury lamp 10 to 12 inches from the patient in order that he may have the advantage of the short rays. * * * * After the first treatment pain and tenderness are relieved, and the spread of the disease is definitely checked. The reason why ultraviolet radiation relieves the pain in erysipelas has not been explained. Troup² believes this is due, in part, to the analgesic effect on the interepithelial nerve endings."

*Read at the Fifteenth Annual Session of the American Congress of Physical Therapy, New York City, September 9, 1936.

Summary

"1. Ultraviolet radiation for erysipelas has proved superior to other remedies.

"2. The temperature is reduced to normal in a shorter time than by any other method.

"3. After the first application the overwhelming majority of patients are free of pain.

"4. The time of hospitalization is shortened.

"5. Complications are rare.

"6. The mortality rate is lower than that of any of the other methods of therapy."

References

"2. Troup, W. Annandale: Note on Treatment of Erysipelas by U-V Irradiation, *Brit. J. Phys. Med.* 7:163 (Dec.) 1932. [25]

EXHIBIT V-A

"Dr. Norman E. Titus (New York) * * * *
The point I wish to stress is that the dose that was effective in white individuals was equally so in negroes. This leaves the question of the way ultra-violet works still very undecided.

"I agree that it is desirable to irradiate three or four inches beyond the border of the erysipelas. Whether this is absolutely necessary, only time and research will tell because if the entire lesion is covered by a piece of cardboard and the skin six inches away from the lesion is well irradiated, the lesion will disappear. I observed this strange reaction on a child I treated, that had a severe cellulitis of

the scalp and erysipelas extending beyond the scalp. I gave it one treatment of about 12 or 14 E. D. and the poor child looked so bad the next day I hesitated to repeat it on the head. I therefore gave 20 E. D. on the buttocks and lumbar region and the erysipelas promptly cleared up within 24 hours. This appears to me to indicate that the effects of the treatment are more general than local. The fluid in the oedematous skin is reabsorbed, and increases the resistance of the body to the existing infection." [26]

EXHIBIT VI

Physical and Therapeutic Considerations of the Mercury Spectrum*

by

John Severy Hibben, M. C.

and

John S. Beckett

Physical Chemist, R. C. Burt Scientific
Laboratories

Pasadena, California

taken from

Archives of Physical Therapy, X-ray, Radium
June, 1933 - Pages 356-359

Factor of Dosage

"The other division of ultraviolet radiation, the

*Read at the Eleventh Annual Session of the American Congress of Physical Therapy, New York, September 9, 1932.

abiotic, concerns radiation below 2900 Å and as low as 2200 Å. These rays are erroneously supposed to destroy Vitamin D, while as a matter of fact Smacukla, Sonne and Reckling,⁽³⁾ Marshall and Knudsen, ⁽⁴⁾ and Steenbock,⁽⁵⁾ have shown that wave lengths between 2200 Å and 2800 Å are more rapid than frequencies between 2900 and 3160 Å in the activation of Vitamin D, and do not destroy Vitamin D, if properly dosed ultraviolet is used. Accordingly, in the Cold Quartz Whole-Body radiation generator we have an effective agent against calcium deficiency disease, and a uniform source of emission can be used in definite dosage.

Factors of Penetration

“The next problem in the therapeutic application of ultraviolet is the question of penetration and absorption. The law of von Grotthus states that only the radiation which is absorbed is active in producing chemical change; and to have absorption we must have penetration.

“As a matter of fact, the penetration of ultraviolet through the normal skin is a rather negligible factor regardless of wave lengths and intensities, and it is believed that some day we will find that the therapeutic results of ultraviolet irradiation do not depend on this factor alone, but rather upon photochemical change in the outer layer of the skin produced by the ultraviolet and other secondary radiation and absorption factors. These secondary radiations must in turn penetrate to the necessary depth to accomplish the desired result.

“In regard to the penetration of ultraviolet rays into live animal tissues, Anderson and Fraser⁽⁶⁾ give the following conclusions:

“After a consideration of these experiments and of the literature it appears justifiable to make a few generalizations of the transmission of ultraviolet rays through the human skin”:

“1. The epidermis of the young child varies between 0.15 and .25 mm. in thickness. Through this thickness ultraviolet rays may be transmitted to the following extent:

2567 A. Trace to 0.5 per cent.

2967 A. 1 per cent to 5 per cent.

3130 A. 5 per cent to 10 per cent.

2. The epidermis of adults is considerably thicker than that of [27] young children, averaging about 1mm. The amount of incident ultraviolet radiation which can normally penetrate through this layer is for all wave lengths of the ultraviolet less than 0.1 per cent.

“The figures correspond to the finding of our well-known American authority, Coblentz: ⁽⁷⁾

Far ultraviolet 1800 to 200A.

Superficial 0.1 to 0.3 mm.

Near ultraviolet 2900 to 3650 A.

Superficial 0.3 to 0.5 mm.

“Rosewarne⁽⁸⁾ gives a table of the comparative penetration of various rays through the human skin as follows:

Penetration of skin by light rays—

Length of Wave	Penetrate to	Effects
2000 to 2400 A.	The horny layer (Corium).	Surface organisms killed. Erythema pro- duced.
2400 to 2900 A.	The basal cell (Stratum Granu- losum).	The same pigments formed in this layer.
2900 to 3300 A.	Network of blood ves- sels (Rete Vascu- losum).	Stimulation of sweat glands and sympathe- tic nerve terminals. Communication with blood.

“Proven facts About Ultraviolet. Properly dosed ultraviolet rays have prophylactic and curative effects on rickets, infantile tetany, apasmophilia and osteomalacia.

“Conditions Improved by Ultraviolet Radiation.

1. Irradiation of prenatal and nursing mothers has a definite preventive effect on rickets. 2. Lesions of erysipelas are benefited with one or more irradiations of ultraviolet rays of wave lengths of 2800 A or shorter when sufficiently intense. 3. Tuberculosis of the bone, articulations, peritoneum, intestines, larynx and lymph nodes. Ultraviolet seems to have a specific and selective action.

“Skin Diseases.

a. Lupus Vulgaris. Ultraviolet acts specifically on this skin lesion in wave lengths of 2800 A or shorter if sufficiently intense.

b. Superficial Fungus infections of hands, feet and body. 1st and 2nd degree of erythema doses of ultraviolet are helpful.

c. Pityriasis rosea. Second degree erythema doses are needed in these cases.

d. Psoriasis. Initial and superficial eruptions respond to second degree erythema doses of ultra-violet; slightly infiltrated and [28] deeply infiltrated cases respond slowly. All types tend to recur. General body irradiations is persisted in will clear up many cases.

e. Alopecia areata. 3rd or 4th degree erythema will often stimulate growth of hair in early cases, older cases sometimes show improvement.

f. Impetigo. Two or three treatments using a second degree erythema dose after scabs and crusts have been removed will usually clear up the case.

“Treatment of Wounds. In my practice nearly every wound is irradiated daily at each dressing time, using short wave lengths for a time equivalent to a first or second degree erythema. I believe this adjunct to be of special value in infected wounds.

“Electrical Burns. Ultraviolet in these cases stimulates healthy granulations and helps to keep the wound clean. Here I employ first or second degree erythema of intense short wave lengths.

“Skin Grafting. Ultraviolet is a distinct aid in preparing the wound for skin grafting. It produces healthy red vascular granulations free from exudate. Here also first and second degree erythema is produced, using short wave lengths.

“Almost every disease known could be mentioned

and we would find a claim that ultraviolet was indicated.

“1. As a tonic Effect. It is my experience and belief, without scientific proof, however, that general body radiations have increased the physical well-being of patients. We have observed that since we have routinely irradiated our post-operative cases their convalescence has been markedly shortened. In deficiency cases the blood count shows increases of hemoglobin leucocytes and blood platelets. Basal metabolism rate is raised in previously low case.

“2. Common Colds. In spite of lack of confirmation of the work of Maughan and Smiley ⁽¹⁰⁾ who claimed to have reduced the incidence of colds 40 per cent in a series of college students, my experience has proven it a valuable prophylactic adjunct.

“4.” Ultraviolet in Bronchial Asthma. Unger ⁽¹¹⁾ believes that as an accessory method of treatment, ultraviolet irradiations help as a tonic and seem to be especially valuable in the undernourished. He believes it has no specific value as yet. His cases have certainly improved since he has adopted its use.

Conclusion

“It has been shown that the therapeutic range of ultraviolet lies approximately between 3200 A to 2200 A; that these wave lengths are more rapid than those frequencies of longer wave lengths in

the activation of Vitamin D, and do not destroy Vitamin D if proper dosage is administered." [29]

References

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"11. Unger, I.: *Progress and Treatment of Bronchial Asthma*. *Ill. Med. J.*, 55:270 (Oct.) 1930. [30]

EXHIBIT VI-A

Discussion

"Dr. Jerome Weiss (Brooklyn): * * * *

Such inconsistencies do not follow through Dr. Hibben's paper. The review of the uses of ultra-

violet light is excellent and of particular value since based largely upon actual personal experience, rather than being strictly a compilation or review of the literature. It is pleasing to note the attention which Dr. Hibben gives to the treatment of wounds with ultraviolet light. I would like to mention in this connection the technic of the so-called "pink reaction," which I have found very useful. In this the daily dose of ultraviolet light is determined by the progress since the previous treatment. If the wound is not clean and has not improved, the dose is increased. If blue or cyanotic, the dose has been too large, and is reduced or omitted for the day. If the tissues are found to be of a bright pink color and clean, the dose has been correct and is repeated."

EXHIBIT VI-B

Discussion

"Dr. N. H. Polmer (New Orleans): * * * *

We are reminded of von Grotthus' law which states that only those radiations which are absorbed produce chemical reaction. Mayer calling attention to the studies of Bachem and Reed, states that at 2800 A, there is such a marked absorption in the corneal and prickle cell layers of the skin that the antirachitic effect of this particular wave length must occur in these layers. He points out that on both sides of this band, namely, 3000 A and 2500 A, there is a deeper penetration reaching the mal-

pighian layer and corium which indicates that the erythema production lies in the corium or just beneath the upper layers.

“Gate tells us that the maximum bactericidal effect of ultra violet radiation lies between 2600 Å and 2700Å, and whereas most of the radiation of the cold quartz generator is at 2537 Å, it appears to me that in addition to its erythema producing effect, these radiations should be bactericidal. This is further substantiated by Eidenow who tells us that only those rays which produce an erythema will increase the bactericidal property of the blood. Therefore, with the information available at the present time and the ultraviolet radiation from the cold quartz generator, it appears to me that we can state it should be expected to produce erythemogenic effects, slight bactericidal effects, both direct and indirect, and possibly antirachitic effects of therapeutic value.

“I asked Dr. Coblentz what in his opinion were the therapeutic properties of wave length 2537 Å? He replied, ‘I am a physicist and a scientist primarily. I can tell you what is in the lamps you use, the kind and amount of wave lengths they produce, but it is for you physicians, clinicians and physical therapists to find the uses of these radiations.’

“The problem is being studied now by Drs. Hibben, Clifton, Weiss, Bachem, Kovacs, Kobak, Ewerhardt, Krusen, Titus, Levine, and many others in our Association, and we hope that in the coming year the diligent work of these investigators will add more proven facts about ultraviolet light and

that ultraviolet irradiation will take its ethical [31] place, not in the blaring light of exploitation, but in the spectrum of rational, scientific physical medicine.”

EXHIBIT VI-C

Discussion

“Dr. H. M. F. Behneman (San Francisco): It is gratifying to work thousands of miles from another Fellow of the Congress and to come here and find some basic, fundamental confirmation of purely clinical findings that I had reported yesterday in about 100 cases. I am particularly interested in the confirmation by these workers of the latent period and the shorter reaction time in so-called cold quartz irradiation and the range of time exposure for producing erythema without blistering by means of these wave lengths.”

EXHIBIT VI-D

Discussion

“Dr. Frank T. Woodbury (New York) * * * *

This matter of the spectrum is also not only a matter of the substance which emits the spectrum but of temperature. Consider the carbon arc lamp and its spectrum. If you raise its temperature a few degrees, you have the spectrum entirely shifted. Your prescription has changed. Everyone knows what a difference it makes with sunshine from hour

to hour, from minute to minute, in altitude, presence of gas, fog, dust and so forth in the air in our heliotherapeutic prescription.”

EXHIBIT VI-E

Discussion

“Dr. J. S. Hibben: * * * *

I treated a case of acne on the face of an adolescent, very blonde and blue-eyed young girl. She had several discreet superficial pustules which I treated with slight pressure for one minute, using the cold quartz orificial lamp. I then called in my laboratory technician and plated a culture from one of these, intending to make an autogenous vaccine. After 24, 48 and 72 hours incubation, no growth was apparent. I repeated the experiment on her as well as on several patients and found that in small superficial pustules that I evidently obtained sterilization, while in the larger pustules with thicker skin covering this could not be done.

“Am I right in my assumption that in selected cases of acne intense ultraviolet radiation in the region of 2537 Å that improvement may be due to the fact that some or all of the organisms are killed, the patient thus producing his own immunity?

“Peskind has advanced the theory that focal immunization consists in killing off some of the germs in a focus, setting free antigen, which is absorbed by the receptive cells in the adjoining tissues, which in turn have been rendered accessible

and permeable to this antigen, thus producing free antibodies, especially opsonins which enter the circulation and exert a curative systemic effect." [32]

EXHIBIT VI-F

Discussion

"Dr. Albert Bachem (Chicago): It was mentioned that the erythema reaction was produced in the corium by the ultraviolet. This might lead to an erroneous conclusion as to the mechanism by which an erythema is produced. Kellogg and Macha have shown that the original effect of ultraviolet is on the prickle cell layer and which in turn is the source of toxin and hormone production. All other effects which lead to erythema and perhaps to pigmentation are produced as secondary effects." [33]

EXHIBIT VII

Dr. Albert Bachem, Ph.D.,
College of Medicine, University of Illinois
in

Archives of Physical Therapy, XIII:614-619

"From the various physical and biological effects observed we can state that the wave length, 2537 AU, has enough penetrating power to produce biologic effects; that it causes an erythema with little danger of over-exposure and accumulation; that it has a positive antirachitic effect, i.e., it produces Vitamin

D and does not destroy it as long as excessive irradiation is avoided. Hence, there is no antagonistic effect between this and the longer actinic rays. In regard to the bactericidal effect it does not differ from rays of longer or shorter wave length. In all these respects the wave length, 2537 AU, must be considered as having normal actinic properties, which makes it useful for therapeutic purposes.”

[34]

EXHIBIT VIII

Ultraviolet Irradiation in Skin Diseases.

Austin Furniss.

Brit. J. Phys. Med. 2:280 (Dec.) 1939.

taken from

Archives of Physical Therapy, March, 1940,

Page 188

“In seborrhoea it is advisable to give the scalp a spirit shampoo before irradiation. Long hair will require thorough combing during irradiation to ensure exposure of the scalp. Sulphur ointment may be applied between exposures. Seborrhoeic dermatitis and infiltrated patches may require more severe reactions—second to third degree erythema—if plaques are associated with the popular dermatitis.

“Herpes in its various forms responds well to ultraviolet irradiation. Relief is afforded not only from the severity of the eruption but from the accompanying pain. In fact, if seen early enough,

little or no pain is experienced after the first treatment. Vigorous local irradiation (second degree erythema doses) not only stop the immediate discomfort but prevent scarring. * * * *

“Dermatitis venenata responds satisfactorily to ultraviolet irradiation. After one or two doses the stinging is dispelled and spreading is usually prevented. Treatment is given every other day, using the air-cooled lamp, a second degree erythema being produced. Other examples of this condition respond well to ultraviolet light.

“The effects of actinotherapy in erysipelas are specific. A critical fall in temperature sets in within 24 to 48 hours, and the condition clears up quickly. Relapses are rare, and clear up equally readily on subsequent irradiation.

“Any greasy ointment is removed. Using the Kromayer lamp at 2 inches distance, the whole or the affected area, including $1\frac{1}{2}$ inches of healthy skin at the margins, is irradiated to produce a heavy third degree reaction. Only the eyeball need protection in head cases. The Kromayer lamp is undoubtedly best for small areas. For larger areas, the mercury-vapour lamp should be used, covering the healthy skin almost to the margins of the area. One treatment usually suffices, unless part of the area has been under-irradiated. The area should be left uncovered after the irradiation.” [35]

EXHIBIT IX

Rational Ultraviolet Therapy and Skin Sensitometry

by

Jean Saidman, M. D.

Director of the Institute of Actinology and of the
Revolving Sanitarium at Aix-les-Bains

Paris, France

taken from

Archives of Physical Therapy, Nov., 1939, Page 678

“The differences between individual opacity of the skin can be studied with a spectrograph through freshly desquamated epidermis after an erythema of the third degree. It was admitted after the researches of Hasselbalch that absorption increases with the frequency of the radiation (short ultraviolet having higher coefficients of absorption). The author pointed out that the epidermis is relatively transparent for the range 2800-2480 A. Later, after my researches, Hausser and Vahle modified the curve of erythema activity of the ultraviolet rays and introduced a second maximum of 2700-2480 A. But I consider that their curve is valuable only for some individuals (22 per cent) and not for all. I published several different charts obtained during my researches with a powerful monochromator. Some patients are more sensitive to the wavelengths 2650 and 2536 A than to 2967-3022 A; others react very strongly to 2967 and 3022 and not at all to 2536 A.” [36]

EXHIBIT X

Genital Tuberculosis

by

Eli A. Miller, M.D.

Denver

and

Mischa J. Lustok, M.D.

Spivak, Colo.

taken from

The Journal of the American Medical Association,

October 7, 1939

Volume 113, No. 15 Page 1392

“Most of the commercial sources of ultraviolet rays produce radiation of mixed wavelengths, predominantly between 2,537 and 3,130 angstroms,¹⁸ while the so-called cold quartz lamp emits a spectrum whose intensity along a wave length of 2,537 angstroms is within 95 per cent of its total spectrum emission, to all practical purposes a monochromatic radiation.¹⁹ The biologic effects of monochromatic ultraviolet radiation in the wavelength of 2,537 angstroms have been extensively studied. The bactericidal action (*Bacillus coli*),²⁰ growth restriction of tissue culture,²¹ coagulation of albumin²² and hemolysis²³ have their peak effectiveness with radiation in the region of a 2,537 angstrom wavelength. The peak of the ergosterol activation curve (formation of vitamin D) has been credited by some workers to wavelengths other than 2,537 angstroms,²⁴ and Van Wijk and Reerink have even claimed destruction of vitamin D by radiation of this wavelength.

A greater number of workers have, however, found ultraviolet radiation of the wavelength 2,537 angstroms unusually active in the production of vitamin D, both in vitro by activation of ergosterol and in vivo by cure of rickets in experimental animals.²⁵

References

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²⁰Ehrisman, O., and Noethling, W.: Ueber die Bactericide Wirkung Monochromatischen Lichtes, *Ztschr. f. Hyg. u. Infektionskr.* 113:597, 628, 1932. Coblentz, W. W.: Physical Aspects of Ultraviolet Therapy, *J. A. M. A.* 111: 419-423 (July 30) 1938; footnote 18.

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²⁵Goldblatt, H.: Prevention and Cure of Rickets in Rats and Anti-rachitic Activation of Ergosterol by Cold Quartz Mercury Lamp, Proc. Soc. Exper. Biol. & Med. 30:380-383 (Dec.) 1932. Windaus, A.: Einige weitere Erfahrungen uber das bestrahlte Ergosterin, Nachr. Ges. Wiss. Gottingen 1:36-37, 1930. Action of Monochromatic Actinic Radiation, editorial, Arch. Phys. Therapy 14:107-109 (Feb.) 1933. [38]

EXHIBIT XI

Experiences With a New Type of Mercury Glow
Lamp*

by

Richard Kovacs, M. C.

Clinical Professor of Physical Therapy, New York
Polyclinic Medical School and Hospital

New York

taken from

Archives of Physical Therapy, Nov., 1938—

Page 661-2

“* * * * The erythema effect of the zone around 3000 A emitted by hot quartz and carbon arc lamps is in over doses followed by painful blistering and strong pigmentation, while the erythema effect produced by radiation around 2500 A leaves scarcely any or at most inconsiderable pigmentation, and is not accompanied by destructive changes in the

skin, although the radiation itself is definitely abiotic to bacteria and other micro-organisms. Little clinical observation has been done so far with this zone of ultraviolet, although there are many studies available about the bactericidal effects of ultraviolet on cultures, such as those of Coblentz and Fulton,² Gates³ and Bachem.⁴

“The author has for some time carried on clinical and laboratory work with a new type of ultraviolet generator. This work has served to corroborate some of the earlier work in the effects of selective radiation and established some additional possibilities of clinical applicability.”

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⁴Bachem, A.: Ultraviolet as Bactericide, *Arch. Phys. Therap. X-Ray, Rad.* 16:733 (Dec.) 1935. [39]

EXHIBIT XII

The Physical Aspects of Ultraviolet Therapy
by

W. W. Coblentz, Ph.D., Sc.D.

Washington, D. C.

taken from

The Journal of the American Medical Association,
July 30, 1938

Volume 111, No. 5

pp 419-422

“Starting with a nonirradiated stock solution of ergosterol, having no antirachitic activity, Bills and his collaborators³ found that, although no new absorption bands occurred, after seven and a half minutes’ irradiation the animal tests revealed the development of an enormous antirachitic potency, 150,000 times that of average cod liver oil. After an exposure of twenty-two and a half minutes the potency increased to 250,000 times that of average cod liver oil. After an irradiation of thirty minutes the maximum at 2,935 angstroms had disappeared; the maximum at 2,820 angstroms was still conspicuous; the maximum at 2,700 angstroms (chart 1) was decidedly distorted, showing the development of a new band at 2,520 angstroms, and the antirachitic potency had dropped to 200,000 times that of the cod liver oil used as a standard. After three hours’ irradiation, when the new absorption band at 2,480 angstroms had developed to its maximum intensity, the antirachitic potency had almost vanished. Continuing the irradiation for from four

to fifteen hours had but little effect on the new absorption spectrum, which has a maximum at 2,480 angstroms. * * * *

“In view of the foregoing results, even though no ill effects seem to have been reported, and an excessive exposure is limited by skin tolerance as manifested by the erythema reaction, the question arises as to the desirability of conducting ultraviolet therapy with lamps emitting an excessive amount of ultraviolet radiation of wavelengths shorter than 2,800 angstroms. For example, in the so-called cold quartz type of mercury vapor lamp, more than 95 per cent of the biologically effective radiation that is emitted is of the wavelength 2,537 angstroms (chart 4). These short wavelengths have a specific germicidal action (chart 2) and, hence, are useful in dermatology. Nevertheless it is a question whether rays of such short wavelengths should be used in general ultraviolet therapy. In view of this uncertainty, the Council on Physical Therapy does not accept, for home use without the direction of a physician, lamps that emit an appreciable amount of ultraviolet radiation of wavelengths shorter than 2,800 angstroms.

The Spectral Range of Antirachitic and Erythema Reaction

“Among the earliest direct determinations of the (antirachitic) healing power of different wavelengths of homogeneous radiations are the observations of Sonne and Reklings,¹⁰ who found that the strong emission lines of the mercury are at 2,537,

2,650, 2,804, 2,967 and 3,024 angstroms had an antirachitic action, whereas wavelengths at 2,400 and 2,480 angstroms had only a slight effect; the emission line at 3,132 angstroms had a doubtful effect, and the line at 3,663 angstroms had no curative effect at all.

“The most recent and most precise evaluation of the spectral [40] antirachitic action of ultraviolet radiation is by Bunker and Harris.¹² The wavelengths of homogeneous radiation were isolated with a powerful quartz monochromator, and their intensities were evaluated radiometrically. More than 300 albino rats were used in these irradiation tests. Since complete healing (as judged by x-ray and line test) cannot be judged accurately, their criterion for judging antirachitic action was the degree of partial calcification known as the equivalent of one Steenbock unit of standard vitamin D. The principal emission lines of the mercury are between 2,537 and 3,025 angstroms inclusive were demonstrated to have antirachitic properties, and the adjacent lines at 2,483 and 3,132 angstroms, respectively, were found inactive.

“In chart 2 is shown the spectral antirachitic response for an equal energy spectrum, as deduced from the data published by Bunker and Harris.¹² The response curve is not necessarily smooth and free from indentations, although it is so depicted for the purpose of this discussion. In chart 2 also is given the spectral absorption of ergosterol.² From this it can be seen that if, as some suppose, the healing of rickets is associated in some manner with

the activation of the sterols (ergosterol, cholesterol) present in the superficial layer of the skin, then, since photochemical action occurs only in the region of absorption, there should be a close parallelism between these two curves, as indicated. For the present this appears to be an interesting coincidence, the biologic significance of which awaits solution.

“As shown in chart 2, the wave length limits of antirachitic and erythematous action are in close coincidence. Hence, since the time of exposure to ultraviolet radiation depends on skin tolerance as indicated by the erythematous response, it is apparent that, with the lamps now available in ultraviolet therapy, the time of exposure is limited by skin tolerance.

Sources of Radiation For Use in Ultraviolet Light Therapy

“From the coincidence of the spectral range of wavelengths of the erythematous and the antirachitic reaction it is evident that, with the sources of ultraviolet radiation now in general use (having a strong emission in the spectral region of 2,500 and 3,000 angstroms respectively), the dosage time of exposure that can be employed without causing a burn is determined by skin tolerance as measured by the erythematous reaction.

“In the treatment of rickets by irradiation there is but little difference in the erythematogenic and antirachitic efficiencies of the various sources of ultraviolet radiation now in use. For example, on the basis of the results published by Bunker and

Harris,¹² assuming that the spectral antirachitic response in human beings is the same as observed on experimentally induced rickets in rats (chart 2), the ratio of the calculated antirachitic efficiency of the ultraviolet radiation from various sources is as follows: 'Therapeutic C' (polymetal) [41] cored carbon arc (antirachitic \div erythema = 1.35); low voltage, high temperature mercury vapor arc in quartz (Uviarc) 1.14; high temperature, mercury vapor arc in Corex D glass (General Electric Company, S-1) 1.14; low vapor pressure, high voltage, low temperature (so-called cold quartz) mercury vapor arc in quartz 1.12 and midlatitude, midsummer, midday, sea level sunlight 0.95.

"This does not take into consideration the efficiency of antirachitic action as dependent on the before mentioned effect, possibly of different wavelengths on calcium and phosphorus metabolism, and also on the deactivation effect of short wavelengths on vitamin D, which may militate against long exposures with sources having a strong emission of wavelengths shorter than about 2,800 angstroms, e. g., the so-called cold quartz lamp, in which over 95 per cent of the activating radiation is in the resonance emission line at 2,537 angstroms. On the other hand, such a source (cold quartz) permits an overexposure, by a factor of 5 or perhaps more, without causing a painful watery blister that results from a slight overexposure to sources of ultraviolet having a relatively strong emission of wavelengths 3,100 to 3,200 angstroms. From this it appears that, since the erythema reaction is a measure of skin

tolerance, it is indirectly a measure of the effectiveness of the sources of ultraviolet radiation now in use in healing rickets."

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¹⁰Sonne, C., and Rekling, E.: Behandlung experimenteller Rattenrachitis mit monochromatischen Ultraviolet Licht, *Hospitaltid.* 70:399 (April) 1927; *Strahlentherapie* 25:552, 1926.

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EXHIBIT XIII

Special Article

Clinical Aspects of Ultraviolet Therapy

by

Ethel M. Luce-Clausen, M.D.

Rochester, N. Y.

taken from

The Journal of the American Medical Association,
July 23, 1938

Volume 111, No. 4—Page 312-316

“* * * A short daily exposure to ultraviolet rays will, in spite of the deficiencies in the diet, make these rats survive as long as twenty-five weeks. They may die, but with normal bones. The mechanism that makes an organism capable of supplying mineral constituents for bone formation, even in spite of a shortage of it in the diet, is set in motion by ultraviolet radiation. That this effect is a chemical one and not brought about by some integrating mechanism in the body such as the nervous system, is shown by the following: Hess and Weinstock¹⁵ took some excised human skin and calf skin and irradiated it with a mercury vapor quartz lamp. Weighed amounts of this when fed to rats fed on a rickets producing diet proved to be completely protective, while similar amounts of nonirradiated skin, although severed from its nerve and blood supply, antirachitic properties. In the same way, a rickets producing diet can be made protective by exposure to ultraviolet radiation.

“Penetration of the Rays: Many writers have investigated the depth to which ultraviolet rays penetrate the skin. Most of them are agreed that the penetration is slight, roughly only 0.1 mm.¹⁸ Measurements of radiation that is absorbed, transmitted and reflected by the skin are admittedly very difficult to make and give variable results. Skin is not homogeneous in an optical sense, and light incident on it is largely reflected and scattered. Anderson and Macht¹⁹ point out that the depth of penetration depends on viability and that rays penetrate more deeply into living than into dead or moribund skin. These authors showed a penetration of 1.2 mm. through living tissue.

“* * * * Ultraviolet radiation raises the phosphate concentration in the blood and also promotes the deposition of lime salts in bone, through the agency of vitamin D which is synthesized in the skin. It is assumed that vitamin D, formed in the skin, is absorbed into the blood stream and carried to the bones. This theory is supported by the work of Hume, Lucas and Smith,²⁰ who showed that vitamin D could be absorbed through shaven areas of skin in rabbits, and more recently Lucas,²¹ in a series of ingenious in vitro experiments, has shown that sufficient ultraviolet of suitable wavelength can penetrate the epidermis. * * * *”

“* * * * This author quotes an analysis of the literature made by Coulter and Carter which shows that, since 1902, out of seventy competent observers forty-six had favorable and twenty-four unfavorable

results with the use of ultraviolet radiation in pulmonary tuberculosis. [43]

The Experimental Production of Skin Tumors with Ultraviolet Radiation

“Malignant tumors have been produced in rats and mice as a result of excessive exposure to ultraviolet radiation given either as sunlight or from artificial sources. Findlay³⁸ in 1928 exposed albino rats to radiation from an ultraviolet lamp at a distance of 18 inches (46 cm.) for one minute three times a week; in one out of a group of six animals a papilloma of the right ear developed and it died of senility after two years’ treatment. Similar results were obtained with mice.³⁹ The exposures given by Findlay compared with those of later writers were of very short duration. Beard, Boggess and von Haam,⁴⁰ applying the technic of Roffo—i.e., twenty hours of ultraviolet radiation daily for one year—were able to produce sarcomas and carcinomas on the eyes, ears, and heads in twelve out of a series of thirty adult rats. The lesions in these animals began to appear after two months of this treatment. Roffo⁴¹ found in his early studies that a rat tumor may contain more than twice as much cholesterol as that found in the host. He exposed rats to sunlight, and to radiations from a Hanau lamp for long periods; he analyzed skin for cholesterol and found high values in irradiated as compared with nonirradiated skin. He obtained neoplasms in a high percentage of his irradiated animals. He suggests that irradiation, by causing

an accumulation of cholesterol in the skin, may prepare the soil for subsequent malignant growth. As a result of this work, a committee was appointed by the Academy of Medicine in Paris to verify the observations of Roffo. The committee confirmed the observations and in view of the potential dangers warned the general public against the abuse of sun baths. Beard and his associates,⁴⁰ however, point out that such a warning may be unnecessary on the ground that (a) the physiologic response of the rat to ultraviolet radiation is greater than that of man and (b) the massive exposures necessary, even for the rat, to produce lesions, leave a wide margin of safety for man. It is also possible that the increased concentration of skin cholesterol produced by Roffo could be produced by other means, such as infections or irritants, and need not necessarily be regarded as a specific effect of radiation. Murray⁴² regards the production of tumors by ultraviolet radiation as merely the effect of an irritant and comparable to the effect of coal tar, x-rays, radium and animal parasites. If this is so, it would seem that, since such extraordinarily long and continuous exposures are required to produce cancer in an animal as sensitive as the rat, man is in no danger. But if it should be proved that the effect of ultraviolet radiation is more specific, if for example the carcinogenic hydrocarbons could be synthesized in the skin by exposure to radiation, then there would be more cause for alarm. Cook,⁴² in a discussion of carcinogenic substances, mentions

this as a possibility but hazards it only as a speculation to stimulate further research.

“In general, one might conclude that experiments such as these indicate a possible but not a very probable danger for man. It is obvious that treatments given should remain within the physiologic limit of tolerance.” [44]

Ultraviolet Therapy and Oral Disease

“Skin tumors have been produced in rats and mice with prolonged exposure to ultraviolet radiation, but the exposures needed are so far outside the range in general use by man, either in sun bathing or in the use of rays from artificial sources, that a warning of danger seems unnecessary. A caution, however, to avoid the abuse of radiation therapy, since its effects on the skin are imperfectly understood, is, at this stage of our knowledge, completely justified. More research is undoubtedly needed on the question of the photodynamic effect of radiation on the skin with special reference to the possible synthesis, in the skin, of the carcinogenic hydrocarbons.

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On the Absorption of Vitamin D from the Skin, *Biochem. J.* 21:362, 1927.

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⁴²Murray, M. A.: Discussion on Experimental Production of Tumours, *Proc. Roy. Soc. London*, series B 113:272, 1933." [45]

EXHIBIT XIV

Precise Evaluation of Ultraviolet Therapy in
Experimental Rickets*

by

John W. M. Bunker, Ph.D. and

Robert S. Harris, Ph.D.

taken from

New England Journal of Medicine, Vol. 216, No. 4,
pp. 165-169 Jan. 28, 1937

Summary

“Depilated rachitic rats were irradiated with measured quantities of monochromatic ultraviolet light to determine the number of ergs required to produce a ‘narrow continuous line of calcification’. The ultraviolet light from a quartz mercury arc, passed through a quartz monochromator, was measured by photochemical and physical methods.

“The principal mercury lines between 2537 and 3025 angstroms, inclusive, were demonstrated to have antirachitic properties. Adjacent lines immediately above and below this region were inactive. To produce rachitic healing equivalent to that produced by 3 international units of vitamin D, the following energies per rat were required:

angstroms	ergs
2537	775,000
2652	660,000

*From the Biological Research Laboratories, Massachusetts Institute of Technology.

Contribution No. 75 from the Department of Biology and Public Health, Massachusetts Institute of Technology, Cambridge, Mass.

angstroms	ergs
2804	600,000
2967	420,000
3025	900,000

“These differences are probably due in part to differences in absorption of the various wave lengths by the skin. They are likely due in part to the absorption spectrum of the provitamin. On a quantum basis the antirachitic effectiveness of the various wave lengths is not the same.” [46]

EXHIBIT XV

Production of Erythema and Tan by Ultraviolet
Energy

by

Matthew Luckiesh and A. H. Taylor, Cleveland
Director and Physicist, Respectively, Lighting
Research Laboratory, General Electric
Company, Nela Park

taken from

The Journal of the American Medical Association,
June 17, 1939

Volume 112, No. 24 — pp 2510-2511

“The ultraviolet wavelength region from approximately 2,500 to 3,500 angstroms encompasses the wavelengths found to be most valuable in the prevention and cure of rickets, the production of erythema and tan in human skin, the killing of germs, and various therapeutic applications. However, the effectiveness of equal amounts of energy at various wavelengths in this region varies enor-

mously for each of these reactions. Some studies of the relative effectiveness of energy of different wavelengths for some of these reactions have been made, notably for the cure of rickets, the killing of germs and the production of erythema.

“Several investigators, including ourselves,¹ have studied the effectiveness of ultraviolet energy in producing erythema, and an “erythema effectiveness” curve has been tentatively established by combining all the data available.² The accepted data for wavelengths longer than 3,150 are of questionable accuracy because the energy of longer wavelengths is relatively low in erythema effectiveness and available artificial ultraviolet sources are low in energy in the spectral region from 3,150 to 4,000. In therapeutic applications erythema has proved to be a valuable indicator of dosage of ultraviolet; hence it is important to know the relative effectiveness of different wavelengths in its production.

“Ultraviolet energy in the wavelength region from 2,500 to 2,600 angstroms can cause a strong erythema, visible a few hours after the exposure, but the inflammation subsides and disappears after a few days, leaving little or no tan.”

References

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2. Evaluation of Ultraviolet Radiation, *Tr. Illum. Engin. Soc.* 30:568, 1935.” [47]

EXHIBIT XVI

Archives of Physical Therapy, X-Ray Radium
Official Publication American Congress
of Physical Therapy

Editor: Disraeli Kobak, M. D., Chicago
taken from

Archives of Physical Therapy, X-Ray Radium,
Feb., 1933. Pages 108-109

“Although the bactericidal qualities of the short ultraviolet frequencies as emitted by this and other generators, such as water cooled lamps, are now generally admitted, it is interesting to note the parallelism of their bactericidal action in that both find their greatest therapeutic efficiency in about the same spectral region. Whether the maximum peak is according to Sonne,⁽³⁾ in the region of 265 mu, or, according to Gates,⁽⁴⁾ distributed in several peaks with its maximum in the regions of 265 and 230 mu, or most pronounced from 302 mu on toward shorter wavelengths and reaches a secondary peak at 240 mu, as applied by Bachem,⁽⁵⁾ it is evident that the bactericidal quality of so-called Cold Quartz radiation is not a mooted point. It however establishes an important corrolary of the therapeutic possibilities of this special line on a scientific basis.

“Undoubtedly the most thought provoking effect found in recent experimental work with this particular form of radiation has been its antirachitic and vitamin D producing properties. It was long felt that the radiations of shorter wave lengths not

only had a degradation effect on vitamin D but were antagonistic toward antirachitic action in vivo. Yet during the very period when doubt was greatest as to the ability of monochromatic actinic rays to produce this effect, science was already cognizant of this possibility. Steenbock ⁽⁶⁾ irradiated solid cholesterol with various unmixed wavebands of ultraviolet energy by means of a monochromator, and found that the frequency of wavelength 253.7 mu in terms of absorbed energy, was more than seven and one-half times as effective in vitamin D activation as the wavelength at 302 mu, and wavelength 265 mu was ten times more effective than wavelength 302 mu. According to Marshall and Knudson,⁽⁸⁾ is explained on the basis that, 'the rate of production of vitamin D is directly proportional to the number of light quanta absorbed by ergosterol, and independent of the wavelength of the light used.' The foregoing deduction perhaps comes closer to explaining the mode of vitamin D activation with the entire gamut of the electromagnetic spectrum—from infrared radiation to the cathode rays—than specific action of particular waves.

"More recently Harris and Ober ⁽⁹⁾ have demonstrated irradiation effects with the so-called Cold Quartz on cotton seed oil. By permitting the oil to flow over the quartz of an orificial unit various time lengths of irradiation were established, the separate samples fed to rachitic rats and the effects noted. It was found that those samples irradiated the shortest period (29 seconds), contained suf-

ficient activation to raise the weight, and cure the rachitic animals in seven days. Goldblatt's ⁽¹⁰⁾ work is the most recent confirmation that the spectral band around 254 mu has exceptional antirachitic qualities. He draws the following conclusion from his studies: [48]

"It has been shown that the radiations from the cold quartz mercury lamp are powerfully antirachitic. Direct irradiation for 3 seconds daily prevented the development of rickets in rats fed on a ricket-producing diet. Direct irradiation for 10 seconds daily for two weeks at a distance of 5 inches from the burner brought about complete healing of rickets in severely rachitic rats. Advanced healing occurred in one week in rats irradiated daily for 45 seconds or longer. Under the conditions mentioned in the text, exposure of ergosterol dissolved in olive oil to the radiations from a cold quartz mercury lamp for 1, 5, 10, 20 and 30 minutes at a distance of 5 inches from the burner resulted in the antirachitic activation of all the solutions, of which 0.002 mg. of irradiated ergosterol and 0.001 cc of irradiated olive oil together prevented and cured rickets in rats. The minimum protective and curative doses were not determined.

"According to Bachem ⁽¹¹⁾ the physiological properties of the mercury line 254 mu fulfill all of the recognized postulates of normal radiation. It has enough penetrating power to produce erythemogenic, cito- and bactericidal effects. It has biological reconstructive properties to synthesize vitamin D and thus prevent or cure rickets. His

conclusions antedating the work of Boldblatt, are:
. . . has enough penetrating power to produce biological effects; that it causes an erythema, with little danger of overexposure and accumulation; that it has a positive antirachitic effect; i. e., it produces vitamin D and does not destroy it, as long as excessive irradiation is avoided; hence there is no antagonistic effect between this and the longer actinic rays. In regard to the bactericidal effect it does not differ from rays of longer or shorter wavelengths. In all these respects the wavelength 254 mu must be considered as having normal actinic properties, which make it useful for therapeutic purposes.

“With the foregoing facts before us it does not require great acumen to realize that a particular advance has been made in radiation therapy by means of the introduction of so-called monochromatic filters for therapeutic purposes.”

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9. Harris, H.H., and Ober, F.L.: Private Communication.

10. Goldblatt, H.: Prevention and Cure of Rickets in Rats and Antirachitic Activation of Ergosterol by Cold Quartz Mercury Lamp. Proc. Soc. for Exp. Biol. and Med., 30:380, 1932.

11. Bachem, A.: (5) p. 618." [49]

EXHIBIT XVII

The Action of Ultraviolet Radiation on Dermatophytes

by

A Hollaender & C. W. Emmons

1. The fungicidal effect of monochromatic Ultraviolet radiation on the Spores of *Trichophyton Mentagrophytes*.

Journal of Cellular & Comparative Physiology.

Vol. 13 No. 3 Pages 391-402 — June, 1939.

Summary

"1. Spores of dermatophyte (*Trichophyton Mentagrophytes*) isolated from "athlete's foot" were suspended in a physiological salt solution, non-absorbent for the wave lengths used (2280 to 2950 Å) and exposed to measured quantities of monochromatic ultraviolet radiation. The method of preparing the suspension is described.

"2. Inactivation data for 6 wave lengths in the ultraviolet range indicate that 2537 to 2650 A is the most effective region for the fungus spores tested." [50]

EXHIBIT XVIII.

Ultraviolet Irradiation in Skin Diseases

by

Austin Furniss, L.R.C.P., L.R.C.S., L.D.S., D.P.H.

The British Journal of Physical Medicine — Vol. 2

No. 11 November, 1939

" The valuable action of ultraviolet irradiation in skin diseases is due to many effects. Amongst the general effects are:

(a) Stimulation of cellular metabolism; (b) increased resistance of the body to infection; (c) stimulation of the vasomotor reflexes of the body (there is an increased tolerance to extremes of temperature); (d) improvement in the functional activity of the skin in consequence of a redistribution of blood amongst the organs of the body; (e) production in the skin of vitamin D which hastens the healing of certain skin conditions; (f) alteration in blood chemistry (calcium, Potassium, etc) the rays acting as a mordant for calcium; and (g) a marked psychological improvement.

"Amongst the local effects are:

(a) A bactericidal action on the surface of the irradiated skin; hyperemia, with dilatation of the capillaries of the dermis; cellular nutrition is improved; (c) a sedative and antipruritic action; (d)

inflammatory and causative effects which certain conditions require can be produced; (e) a keratinous action; the basal layer of the epidermis absorbs the ultraviolet rays, and according to the photo-chemical absorption law, reactions only occur in tissues which absorb radiation.”

“ The sedative effect of ultraviolet irradiation on the nerve endings in the skin is very valuable in allaying the intense and distressing itching associated with many skin dermatosis

“Impetigo Contagiosa.

. . . .Irradiation will definitely check the infection, and it is found that 3 or 4 applications of the rays in the course of a week or ten days will usually clear an impetigo contagiosa at any stage

“Eczema.

. Ultraviolet irradiation is of especial value in the less acute and more chronic forms.” [51]

EXHIBIT XIX

Ultraviolet Irradiation in Skin Diseases by Austin
Furniss, L.R.C.P., L.R.C.S., L.D.S., D.P.H.

The British Journal of Physical Medicine Vol. 2,
No. 12 Dec. 1939

“Herpes. This disease in its various forms responds well to ultraviolet irradiation. Relief is afforded not only from the severity of the eruption but from the accompanying pain.

“Pernio (chilblains). The cure of this disease by ultraviolet irradiation is rapid and usually lasting, at least for the particular season, The worse the condition the more striking the results.

“Urticaria.Mild applications of actinic rays usually suffice to relieve the intense itching and to clear up the condition.

“Dermatitis Venenata. This condition responds satisfactorily to ultraviolet irradiation. After one or two doses the stinging is dispelled and spreading is usually prevented.

“Furunculosis. Boils, carbuncles, whitlows, septic corns, cuts and pyoderma in children seldom fail to respond to properly administered ultra-violet light applications.

Ulcers. Ulcers respond well to ultraviolet irradiation, the rays producing a direct bactericidal action on the surface organisms, relief of pain, stimulation of the local circulation, growth of healthy scar tissue, and increase of the calcium content of the blood. The cyanosed appearance fre-

quently associated with varicose ulcer turns, after irradiation, to a much healthier tint.

“Indolent wounds. Ultraviolet irradiation is a powerful factor in the healing of wounds. The direct bactericidal action of the short waved rays, combined with the leucocytosis which they produce, quickly overcomes infection, and brings the lesion to a condition in which the stimulus of milder irradiation promotes strong free proliferation of new tissue. Wounds treated in this way heal rapidly with excellent cosmetic results, leaving scars of smooth, fine texture, usually level with the skin.”

[Endorsed]: Filed F.T.C. Jan. 14, 1941 [52]

United States of America

Before Federal Trade Commission

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 8th day of June, A. D. 1942.

Commissioners:

William A. Ayres, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
Robert E. Freer.

Docket No. 4407

In the Matter of
Ultra-Violet Products, Inc.,
a corporation.

FINDINGS AS TO THE FACTS AND CONCLUSIONS

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 7, 1940, issued and subsequently served its complaint in this proceeding upon the respondent, Ultra-Violet Products, Inc., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing of respondent's answer, testimony and other evidence in support of the allegations of the complaint were introduced by Merle P. Lyon, attorney for the Commission, and in opposition thereto by Ernest A. Tolin, attorney for the respondent, before Edward E. Reardon, a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the complaint, the answer of the [115] respondent, testimony and other evidence, report of the trial examiner upon the evidence, briefs in support of and in opposition to the complaint, and oral argument, and the Commission, having duly considered the matter and

being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

Paragraph One: The respondent, Ultra-Violet Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 5205 Santa Monica Boulevard, Los Angeles, California. Respondent is now and for some ten years last past has been engaged in the manufacture and in the sale and distribution of a certain device known as a therapeutic lamp, used for the radiation of ultra-violet rays. The lamp is sold by respondent under the trade name "Life Lite", and is intended by respondent for use in the treatment of various ailments, diseases, and conditions of the human body.

Paragraph Two: The respondent causes and has caused its lamps, when sold, to be transported from its place of business in the State of California to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains and for some ten years last past has maintained a course of trade in its lamps in commerce among and between the several states of the United States and in the District of Columbia.

Paragraph Three: In the course and conduct of its business and for the purpose of promoting the

sale of its lamps, the respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of, various advertisements concerning its lamps by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and respondent has also disseminated and is now disseminating, and has caused and is now causing [116] the dissemination of, advertisements concerning its lamps by various means for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of its lamps in commerce, as commerce is defined in the Federal Trade Commission Act.

Among the representations appearing in respondent's advertisements, disseminated and caused to be disseminated as set forth above, by the United States mails, in newspapers and periodicals, and by other media, are the following:

"Life Lite ultra-violet rays clear up many of the chronic skin disorders which have failed to respond to other methods of treatment. . . . Most infections of the skin respond quickly to the germ killing effects of the rays. Furthermore, they stimulate the skin tissue to build a high degree of disease resistance."

"Ultra-Violet helps to set up a chemical reaction that keeps the blood stream in balance. It aids in overcoming a deficiency of either white or red blood corpuscles. . . . As well as deficiencies of the red coloring matter that is so important as an oxygen carrying agent.

Thus, this tonic effect on the blood not only builds direct resistance to infection but also stimulates the endocrine glands that are so vital to health."

"The chemical action of ultra-violet rays soothes the nerve endings in the skin and alleviates many internal conditions. The anti-acid or alkalinizing effect of ultra-violet rays, plus their ability to increase the general resistance, help to correct many forms of illness."

"Build Better Health with Life Lite . . . A full quota of sunlight whether obtained from natural or artificial sources means a better functioning of the human body. It helps build resistance against disease, improves metabolism and increases capacity for work or play."

"Many disorders of the catarrhal type, such as asthma, hay-fever, bronchitis, colds, sinus [117] trouble, and discharge from the ears, are corrected more rapidly if daily treatment is given with the cold ultra-violet ray lamp."

"Many skin diseases, where fungi are present, such as barber's itch, ringworm, and impetigo, also disappear when the proper dosages of the rays are used. . . . Great improvement in cases of athlete's foot will quickly be noted."

". . . In acne, eczema, psoriasis, shingles and erysipelas, ultra-violet can often be used with marked benefit. The ultra-violet rays destroy

germs and also hasten the growth of new, clean tissue. . . .”

“Life Lite is indispensable for the home treatment of a great many skin diseases and for relieving many types of illness. It is without doubt the finest means of building up the general resistance, overcoming low vitality, and quickening convalescence of any known natural treatment.”

“Patients with anemia should receive ultra-violet light treatments in addition to dietary changes. The light-ray applications have a tendency to increase both the hemoglobin and red corpuscles of the blood.”

“You will find our quartz ultra-violet lamps to be the safest and most efficient on the market. The intensity is correctly regulated so that there is no danger of serious over-exposure.”

“These rays are absolutely necessary to vigorous, normal existence as well as a powerful aid in healing disease. It has been shown that the ultra-violet rays are one of the main factors which produce improved tone, increased resistance and better mental reaction. They tone up the nervous system and induce restful sleep by a regulatory influence on the metabolism in all cases showing a calcium and phosphorus deficiency.” [118]

“Quartz ultra-violet rays normalize body chemistry! Life Lite rebuilds your resistance

to colds, increases vitality and heals most skin diseases.”

“Skin Diseases, acne, eczema, psoriasis, sores, ulcers, infections, etc. Life Lite quartz ultra-violet lamps heal most skin diseases safely, quickly and easily at home.”

“Get your quota of sunlight with Life Lite
* * * clear up most of your chronic skin disorders
* * * build resistance against disease
* * * and relieve pain. Sufferers from psoriasis, acne, eczema, ulcers, and impetigo have obtained noticeable improvement after consistent use of Life Lite.”

Paragraph Four: Through the use of these representations and others of a similar nature the respondent has represented, directly or by implication, that its lamp is a sun lamp, and that the lamp will afford benefits to the skin and to the general health of the user comparable to those afforded by natural sunlight; that the use of the lamp constitutes a cure or remedy, or a competent and adequate treatment for asthma, hay fever, bronchitis, colds, sinus trouble, discharges from the ears, barber's itch, ringworm, athlete's foot, acne, eczema, psoriasis, shingles, erysipelas, anemia, sores and ulcers; that it stimulates the tissues of the skin; that it builds up in the body resistance to disease; that it produces a chemical reaction which keeps the blood stream in balance; that it aids in overcoming a deficiency of either white or red corpuscles; that it produces a tonic effect upon the blood; that it builds up the resistance of the body to infections;

that it stimulates the endocrine glands; that it quiets and soothes the nerves, particularly the nerve endings in the skin; that it acts as an antacid and has an alkalizing effect upon the body; that it improves metabolism; that it makes the body strong, increases vitality, and build new tissues; that it improves the general tone of the body and improves mental reactions; that it tones up the nervous system and induces sleep; that it normalizes the chemistry of the body and that it relieves pain.

Paragraph Five: Respondent's lamp is made in some seven different models, divided generally into [119] hand lamps and stand lamps, that is, lamps which are mounted upon a stand. With the exception of one or two of the models which are intended for use by physicians exclusively, the lamps are designed primarily for use by the general public for self-application in the home. The lamps are sold principally through dealers, except in the trade area around Los Angeles, where respondent contacts the purchasing public direct by means of sales agents.

The lamp is of the type known as the cold quartz lamp. The essential part of the device is a quartz tube, which contains a mixtre of certain gases, together with a small amount of mercury. The tube is hermetically sealed to prevent the escape of the gases, and to prevent the entrance into the tube of any air from the outside. When the tube is subjected to electric current the ionization of the mercury vapor results in the radiation from the tube of ultra-violet rays. Each lamp is equipped with a time clock for regulating the use of the lamp. This

clock may be set for such period of time as the user may desire, and upon the lapse of the fixed period of time the lamp is shut off automatically. The maximum period of time permitted by the time clock is six minutes.

Along with each lamp sold, respondent supplies to the purchaser a pair of goggles for use while the lamp is in operation. Printed instructions for the use of the lamp are also supplied by respondent to each purchaser, the pertinent portions of such instructions being, in the case of the hand lamp, as follows:

“Caution: Goggles must be worn to protect the eyes from sunburn all the time the light is on.

* * *

“Directions For Use

“Goggles are furnished with every lamp and it is vitally important to wear them as the ultra-violet rays will sunburn unprotected eyes which makes them inflamed and painful but [120] which causes no other harm or injury.

“Uncover the portion of the body to be exposed, as the passage of ultra-violet through clothing is very limited.

“Best results may be expected if your physician is consulted concerning frequency and length of treatment. This particularly applies to infants and children. Your physician is the proper guardian of your health.

* * *

“Treat the Abdomen

“The ultra-violet rays have very slight penetration and for this reason it is desirable to treat that part of the body in which the blood stream is closest to the surface. Best results are obtained by treating the abdomen and chest areas because 70 per cent of the blood that goes into the skin capillaries comes to the surface in these areas. It is advisable to take treatments in a warm room, as the blood will be closer to the surface of the body than when exposed to a chilly temperature. Under these conditions it is possible to receive a much better reaction than if the cold air is striking the skin and causing the blood to remain in the deeper tissues.

“Types of People

“Blonds and brunettes react differently to the ultra-violet. A brunette will usually require longer exposures while the fair-skinned blonde generally reacts readily. Age must also be considered; the very old and the very young demanding greater caution. Children up to four or five should be given shorter treatments and it is best to give the treatments in the mornings. Some adults also find it preferable to take treatments in the morning rather than in the evening because of the stimulative effect of the rays. [121]

“Treatments

“For a general body sunbath: Turn the

lamp on for one minute, hold the lamp about one-half inch from the skin and pass the lamp over the chest and stomach. One or two minutes distributed over the chest and stomach is enough for the first treatment. Infants, and young children, or very fair-skinned adults should be started at from one-quarter to one-half of the above exposure times. The time may be increased one minute each day until a light pinkish flush of the skin is obtained, which will show up about six hours after the treatment. Once the desired reaction is established, continue the daily treatments with this same length of time as long as the reddening continues. If the skin becomes accustomed to the rays the time may be increased until the desired effects are obtained.

“Keep The Light Moving

“Keep it moving slowly over the body all the time. This gives an even distribution of the rays and prevents spot sunburning. Never give a long enough treatment to get an extreme reaction; if you should, allow an interval of three or four days before the next treatment. One person may receive the beneficial effects of the ultra-violet rays in a two-minute or three-minute treatment, while another person will require a six-minute or seven-minute treatment over a selected area, such as the abdomen and chest. It is obvious that it is not the length of time that determines the treatments, but the re-

quired reaction through an amount sufficient to produce the slight reddening of the skin.

“It is important to use the lamp always at the same distance from the skin; for the intensity is greatly affected by a change in distance because the intensity varies inversely as the square of the distance.” [122]

The directions for the use of the stand lamp are identical with those for the hand lamp, except that the portion captioned “Treatments” reads as follows:

“For a general body sunbath use the lamp 20 to 24 inches from the body. The tube in this lamp is genuine quartz and the first treatment should be for not more than a one-minute exposure. The greater the distance, the longer the exposure, the ratio of distance and time being approximately proportional according to the inverse square law. Example: 2 minutes at 20 inches equals approximately 4 minutes at 30 inches.

“If it is desired to treat small areas of the body the lamp may be placed closer and the treatment time reduced accordingly. Infants and young children, or very fair skinned adults should be started at from one-quarter to one-half of the above exposure time.

“The time may be increased one minute each day until a light pinkish flush of the skin is obtained, which will show up about six hours after the treatment. Once the desired reaction

is established, continue the daily treatments with this same length of time as long as the reddening continues. If the skin becomes accustomed to the rays the time may be increased until the desired effects are obtained. Never give a long enough treatment to get an extreme reaction; if you should, allow an interval of three or four days before the next treatment. One person may receive the beneficial effects of the ultra-violet rays in a two-minute or three-minute treatment, while another person will require a six-minute or seven-minute treatment over a selected area, such as the abdomen and chest. It is obvious that it is not the length of time that determines the treatments, but the required reaction through an amount sufficient to produce the slight reddening of the skin.

“It is important to use the lamp always at the same distance from the skin for the [123] intensity is greatly affected by a change in distance.”

There is attached to each lamp, when sold, a large red tag, which reads as follows:

“Caution

“To be used only by or on the prescription of a physician fully licensed and qualified by training and experience in the use of ultra-violet radiation.

“A survey of accepted medical literature indicates that treatment of certain pathological

conditions with ultra-violet radiation may be harmful.

“In those conditions in which treatment is not contra-indicated, the physician will consider the type and extent of pathology present, and make such modifications of treatment as may be indicated.

“Treatment may be contra-indicated in the following conditions:

Active and progressive pulmonary tuberculosis.

Advanced heart disease without compensation or myocarditis in the aged.

Advanced arteriosclerosis.

Cross renal or hepatic insufficiency.

Certain types of generalized dermatitis.

Acute or chronic nephritis.

Diabetes, hyperthyroidism and photo-sensitization.

“Do Not expose the eyes to the direct light from this lamp. Wear suitable goggles.”

Paragraph Six: The unit of measurement for the wave length of light rays is the angstrom. The wave lengths of ultra-violet rays emitted from natural sunlight range from 2900 to 3900 angstrom units. Lamps which emit ultra-violet rays within this range [124] are known and designated by physicians and chemists as sun lamps, while lamps which emit ultra-violet rays of less than 2900 angstrom are known and designated as therapeutic lamps. The wave length of 89.2 per cent of the rays emitted by

respondent's lamp is approximately 2540 angstroms, and the lamp therefore is not a sun lamp but falls within the category of therapeutic lamps. The principal difference between the effects produced by the two types of lamp is that the rays emitted by the therapeutic lamp are more intense and consequently harsher and more irritating to the skin than those emitted by the sun lamp.

The benefits afforded by respondent's lamp to the skin and to the general health cannot properly be compared with those afforded by natural sunlight because of the wide variation between the rays emanating from the two sources. Those emitted from natural sunlight range from 2900 angstroms in the ultra-violet rays, as pointed out above, to approximately 50,000 angstrom in the infra-red rays.

Paragraph Seven: While ultra-violet rays of the wave length emitted by respondent's lamp possess bactericidal properties, such properties are effective only in those cases where the infection sought to be attacked is limited to the surface of the skin. The rays are incapable of penetrating the surface of the skin and destroying bacteria or fungi present below the surface. The use of respondent's lamp therefore does not constitute a cure or remedy or a competent or adequate treatment for such conditions as barber's itch, ringworm, athlete's foot, acne, eczema, psoriasis, shingles, or erysipelas, all of which are due to causes existing below the surface of the skin. In the case of sores and ulcers, the lamp may possibly stimulate the healing process but only in those

instances in which the infection causing the condition is confined to the surface of the skin.

The lamp possesses no therapeutic value in the treatment of asthma, hay fever, bronchitis, colds, sinus trouble, or discharges from the ears. It is likewise ineffectual in the treatment of anemia. It is incapable of building up in the body resistance to disease. It does not produce any chemical reaction [125] with respect to the blood stream, nor is it of any assistance in overcoming a deficiency of either white or red corpuscles. It has no tonic effect upon the blood. It is incapable of building up the body's resistance to infection or stimulating the endocrine glands. Aside from its irritating effect, the lamp affords no stimulation to the tissues of the skin.

The lamp has no therapeutic effect upon the nerves or upon the nerve endings in the skin. It does not act as an antacid and has no alkalizing effect upon the body. It is incapable of improving the general tone of the body, making the body strong, increasing vitality, or improving mental reactions. It does not tone up the nervous system or induce sleep. It does not relieve pain. The lamp is incapable of normalizing body chemistry or affecting metabolism, except insofar as its use may activate cholesterol in the skin, resulting in the production of Vitamin D and the consequent absorption and deposition of calcium and phosphorus in the tissues, particularly in the bone tissues. Likewise, any effect which the lamp may have with respect to the building of new tissues is limited to such effect as may result from the production of Vitamin D.

The Commission therefore finds that the representations made by respondent with respect to the therapeutic value of its lamp are erroneous and misleading, and constitute false advertisements.

Paragraph Eight: Unless used with due care, respondent's lamp possesses potentialities for injury to the user, in that excessive exposure to the lamp either with respect to proximity or length of time may result in severe erythema (sunburn). A further need for care in the use of the lamp arises by reason of the fact that certain types of persons are hypersensitive to ultra-violet rays, this being particularly true in the case of fair-skinned persons and young children. Moreover, certain types of skin disorders, particularly lupus erythematosus and some types of eczema, are aggravated rather than helped by ultra-violet rays. Such rays are also contra-indicated in the case of pellagra. [126]

Another of the principal dangers in the use of respondent's lamp is that unless suitable goggles are worn to protect the eyes from the ultra-violet rays the use of the lamp may result in severe conjunctivitis.

While the directions for use accompanying respondent's lamp contain certain cautionary statements with respect to some of the potential dangers in the use of the lamp, respondent's advertisements make no reference to any of such dangers, nor do they contain any reference to the cautionary statements appearing in the directions for use. The Commission therefore finds that respondent's advertisements are false for the further reason that

they fail to reveal facts material in the light of the representations contained therein, and fail to reveal that the use of respondent's lamp under the conditions prescribed in the advertisements or under such conditions as are customary or usual may result in substantial injury to the user.

Paragraph Nine: The Commission further finds that the use by the respondent of the false advertisements herein referred to has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that respondent's lamp possesses therapeutic values which it does not in fact possess, and that such lamp is entirely safe for use in all cases, when such is not the fact, and the tendency and capacity to cause such portion of the public to purchase such lamp as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

By the Commission.

Dated this 8th day of June, A. D., 1942.

[Seal] GARLAND S. FERGUSON

Garland S. Ferguson,
Acting Chairman

Attest:

OTIS B. JOHNSON

Otis B. Johnson,
Secretary. [127]

[Title of Commission and Cause.]

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, report of the trial examiner upon the evidence, briefs in support of and in opposition to the complaint, and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act;

It Is Ordered that the respondent, Ultra-Violet Products, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of respondent's therapeutic lamp designated as "Life

Lite", or any other lamp of substantially similar construction, whether sold under the same name or any [128] other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication,

(a) that said lamp is a sun lamp, or that it affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight;

(b) that said lamp constitutes a cure or remedy or a competent or adequate treatment for barber's itch, ringworm, athlete's foot, acne, eczema, psoriasis, shingles, or erysipelas;

(c) that said lamp constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except insofar as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin;

(d) that said lamp possesses any therapeutic value in the treatment of asthma, hay fever, bronchitis, colds, sinus trouble, or discharges from the ears;

(e) that said lamp possesses any therapeutic value in the treatment of anemia;

(f) that said lamp builds up in the body resistance to disease;

(g) that said lamp has any tonic effect upon the blood, that it produces any chemical reaction with respect to the blood streams, or that it is of any [129] assistance in overcoming a deficiency of white or red corpuscles;

(h) that said lamp builds up the resistance of the body to infection, or that it stimulates the endocrine glands;

(i) that said lamp affords any stimulation to the tissues of the skin in excess of such stimulation as may result from its irritating effect;

(j) that said lamp quiets or soothes the nerves or the nerve endings in the skin;

(k) that said lamp acts as an antacid or has any alkalizing effect upon the body;

(l) that said lamp improves the general tone of the body, makes the body strong, increases vitality, or improves mental reaction;

(m) that said lamp tones up the nervous system, induces sleep, or relieves pain;

(n) that said lamp normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use may result in the production of Vitamin D.

2. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to reveal that excessive exposure to said lamp either with respect to proximity or length of time may result in injury to the user; that said

lamp should not be used in the case of pellagra, lupus erythematosus, or certain types of exzema; and that said lamp should never be used unless goggles are worn to protect the eyes; provided, however, that such advertisement need contain only the statement, [130] "Caution: Use Only As Directed", if and when the directions for use, wherever they appear on the label, in the labeling, or both on the label and in the labeling, contain a warning to the above effect.

3. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said lamp, which contains any representation prohibited in paragraph 1 hereof, or which fails to comply with the affirmative requirements set forth in paragraph 2 hereof.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

[Seal]

OTIS B. JOHNSON

Otis B. Johnson,

Secretary. [131]

[Title of Commission and Cause.]

CERTIFICATE OF SECRETARY OF
FEDERAL TRADE COMMISSION

I, Otis B. Johnson, secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, and separate original exhibit marked:

2-1

4407-1

That this transcript is certified to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist, dated June 8, 1942, entered by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 24th day of May, A. D. 1943.

[Seal]

OTIS B. JOHNSON

Otis B. Johnson,

Secretary.

PROCEEDINGS

Trial Examiner Reardon: The hearing in the matter of Ultra-Violet Products, Inc., Docket No. 4407, is now convened at Los Angeles, California, at 10:00 a. m., Pacific Standard time, on the 28th day of May, 1941, in Room 255 of the Post Office Building.

Merle P. Lyon, Esq., of Washington, D. C., appears for the Commission; and Ernest A. Tolin, Esq., of 756 South Broadway—is that Los Angeles?

Mr. Tolin: Yes.

Trial Examiner Reardon: —Los Angeles, California, appears for the respondent. [2*]

THOMAS S. WARREN

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lyon:

Q. Will you state your name and address, please?

A. Thomas S. Warren. Residence or business, you mean by “address”?

Q. Your home address?

A. 928 North Kingsley Drive, Los Angeles.

Q. What is your business or occupation?

A. General manager of the Ultra-Violet Products, Incorporated.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Thomas S. Warren.)

Q. What is the correct name of that company, Mr. Warren?

A. Ultra-Violet Products, Incorporated.

Q. And sometimes you use the words "Ultra-Violet Products, Inc."?

A. That is right.

Q. To designate the corporation?

A. I-n-c.

Q. And that is the respondent in this case?

A. Yes.

Q. What is your official position with that company?

A. President.

Q. How long have you held that position?

A. Since the incorporation in 1934,—in '33 or '34. [3]

Q. Will you state the nature of the business of Ultra-Violet Products, Inc.? What do they sell or distribute?

A. We manufacture ultra-violet lamps for health purposes, for sterilization purposes and for mining fluorescence.

Q. Three different purposes, is that it?

A. That is correct. [5]

Q. Now, just generally what are these other lamps that you sell?

A. We make ultra-violet lamps for sterilization purposes in meat boxes and refrigerators, in air conditioning rooms, air ducts, and bakeries, or any place where it is necessary for bactericidal purposes.

Q. And the mining lamps?

A. The mining lamps are used for the analysis

(Testimony of Thomas S. Warren.)

of ores; also used by criminal departments of police departments, and also in laboratories for chemical analysis of all kinds of materials. [6]

Q. Ultra-Violet Products, Inc. is a California corporation, is it? A. Yes.

Q. Is the statement in the letter that the time of incorporation was December 18, 1933, correct?

A. That is right. [54]

I started in business in November of 1932.

Q. Under your own name?

A. Under my own name.

Q. And as a private individual, without a partnership?

A. Purely as my own business, under the name of Ultra-Violet Home Products Company. Then in December of 1933 I incorporated the company. [56]

Q. Will you state, generally, approximately how many of these Life Lite lamps you have been selling in recent years?

A. Since the company first started in 1932, I have sold approximately 2200 hand lamps, Life Lite lamps, and, oh, probably 1200 or 1500 stand type lamps, but not to exceed—well, I imagine about 1200 is correct. [57]

Q. Have you had any experience yourself personally with the use of these various types of Life Lite lamps? A. Yes, I have.

Q. What experience have you had?

A. Well, when I first started working with ultra-violet light in 1930, I wanted to find out what ef-

(Testimony of Thomas S. Warren.)

fect the light would have upon myself, and I started using it consistently in daily treatments.

[61]

I found that it seemed to give me a little more vitality or increase in my general health, which at that time wasn't any too good. I, for a number of years previous to that, had been subject to colds, had pneumonia a couple of times, and I found by using the lamp it built me up to where I had more resistance. I continued using that for two years, and used it very regularly.

Q. What lamp was this?

A. The Life Lite lamp. The Life Lite lamp from 1932, but prior to that I used a lamp which I had called the Z-Ray. It was a cold quartz lamp.

Q. And it was after that you started putting it out under the name of Life Lite?

A. I was working for another company at that time.

Q. I see.

A. I found in my own personal experience, with the two years continuous use of the lamp, that it built up my resistance to where I went through four years without any colds or any sickness or illness of any kind.

Mr. Lyon: Just a minute. I object——

The Witness: I continued——

Mr. Lyon: Just a minute. I object to the portion of the witness' answer, where he said the use of the lamp built his health up. I think he can

(Testimony of Thomas S. Warren.)

state just what happened, but not so far as any particular cause for that is concerned. [62]

Trial Examiner Reardon: You object to what he found, but he may state the facts and it is understood that he stated the facts that he observed after his use, that he had no colds whatever.

Mr. Lyon: Yes, but I think that the witness' answer is really not responsive to the question that was originally asked. I asked the witness what experience he had had with the use of this particular lamp.

The Witness: All right.

Mr. Lyon: And I think stating the results that were obtained would not be responsive.

Mr. Tolin: That is a part of the experience.

Trial Examiner Reardon: I will let the answer stand, on the ground that it is admitted solely to show that he used the lamp, and what he said he found out after was the observation as to his condition subsequent to the use of the lamp.

Q. In your further testimony——

Mr. Tolin: I think he should be allowed to finish his answer before you proceed.

Trial Examiner Reardon: Yes, he should be allowed [63] to finish his answer.

By Mr. Lyon:

Q. Go ahead and finish your answer then, Mr. Warren.

A. I used the lamp regularly for at least a period of two years. From that time on I was not

(Testimony of Thomas S. Warren.)

so constant in using it, using it for a matter of a month or so at a time and then ceasing for a matter of several months, and during the following four years from the time that I used it so very regularly, I had no colds and was not in a run down condition and felt that the lamp was the cause for the reaction.

Trial Examiner Reardon: What was that?

Mr. Lyon: I object to the last statement.

The Witness: In my opinion, the reason for my improved health was directly due to the light, because that was the only means used.

Trial Examiner Reardon: I sustain a motion to strike the reason for his improved health.

Mr. Lyon: It is a conclusion and opinion of the witness.

The Witness (Continuing): I have also used the light a number of times for treating athlete's foot condition on my own feet, and I have cleared it up every summer when the condition has occurred.

Mr. Lyon: I object to that.

Trial Examiner Reardon: I will have to grant the [64] motion. You say "I have cleared it up,"——

The Witness: I have relieved it.

Trial Examiner Reardon: As inferring that it was cleared up by the use of the lamp. You may testify after you have used the thing what you observed, and whether you observed something that was there before or not.

(Testimony of Thomas S. Warren.)

The Witness: I observed the fact that my toes had a very red condition, that there was a moist serum being given off from the cracks in between the toes, and they were very red and inflamed, and after I used the lamp—I let the condition exist for a time to give it a thorough test with the Life Lite lamp, and I used it twice a day for a period of probably four or five days, and at the end of that time I observed that the condition between the toes had returned to very nearly normal, that the cracks had disappeared, the skin was nice and smooth and that the redness was gradually going away.

By Mr. Lyon:

Q. What model did you use in those treatments?

A. Model A Life Lite hand lamp.

Q. How far from the body did you hold the lamp?

A. I held the lamp as close to the skin as I could, and I gave myself treatments of from ten to fifteen seconds.

Q. Would you say that was about one inch?

A. In that particular case it was closer, because I got it [65] as close as I could.

Q. Is that the recommended distance to be used for the hand lamp?

A. The hand lamp, in accordance with the directions and instructions, is to be held about one inch away, as you will find there.

Q. From your experience, Mr. Warren, how long did you find it took to produce an erythema on the skin?

(Testimony of Thomas S. Warren.)

A. What part of the body are you talking about?

Q. Well, from the use of a hand lamp, taking any part of the body that you have had experience with.

A. I have had experience with all parts of the body.

Q. All right. Will you tell us what period of time it takes for different portions of the body, to produce an erythema?

A. On the forearm, the underside of the forearm, a person can get an erythema, say, on myself or on the average individual in a ten or twelve second exposure with a lamp at a one inch distance.

[66]

Q. That is continually moving the lamp?

A. Not in that particular case, no. You can get it just by holding it about a one inch distance from the underside of the forearm, —you can get a first degree erythema in about a ten second period of time.

Q. Now, this production of erythema you would say would be in about ten to twelve seconds on the forearm?

A. That is right.

Q. Would there be any difference on other parts of the body? [67]

A. Yes, definitely so. It is next to impossible to get an erythema on the bottom of the foot or on the hands, for instance. You can take an exposure or ten or fifteen minutes without getting an erythema, because of the thickness of the skin.

(Testimony of Thomas S. Warren.)

Q. Now, for the sake of the record, will you tell us just exactly what an erythema is?

A. An erythema is a redness, or is commonly a sun burn condition, which shows up from two to six hours following exposure to the ultra-violet rays.

Q. It would be the same as sun burn, or what is known as sun burn?

A. Identically the same.

Q. That is the medical term for sun burn; is that right? A. Yes.

Q. Now, you have been talking so far about the hand lamp. Is there any difference in the use of the stand lamp with reference to the distance away from the body?

Mr. Tolin: To which we object on the ground that the instruction sheets are the best evidence. There is no evidence that this witness goes about and gives instructions to the persons who purchase the lamps, other than the enclosure of a printed sheet which we already have in the record. [68]

By Mr. Lyon:

Q. I show you Commission's Exhibits 5, 6 and 7, and ask you if these are all with reference to stand lamps, directions for use with reference to those particular types of lamps? A. That is right.

Q. Calling your attention to the paragraph marked, "Treatments," reading as follows:

"For a general body sun bath use the lamp 20 to 24 inches from the body."

(Testimony of Thomas S. Warren.)

Is that the general instruction given for the use of these lamps, so far as the distance from the body is concerned, in all cases?

Mr. Tolin: Objected to on the ground that the instruction sheet itself is the best evidence.

Mr. Lyon: Well, I am calling his attention to the instruction sheet.

Trial Examiner Reardon: Will you read the question, please?

(The question was read by the reporter.)

Trial Examiner Reardon: You referred to those exhibits?

Mr. Lyon: Yes, that is right.

Trial Examiner Reardon: And those exhibits contain the instructions? [69]

Mr. Lyon: That is right.

Trial Examiner Reardon: Those are the only instructions—or, are there any other instructions?

The Witness: No.

Trial Examiner Reardon: Well, that is the answer.

By Mr. Lyon:

Q. Those are the instructions, that I have read to you? A. That is right.

Q. Now, have you tried any of those stand lamps on your own body? A. Yes.

Q. From your experience with those particular types of lamps, what would be the erythema time by the recommended use of those lamps 20 to 24 inches from the body?

(Testimony of Thomas S. Warren.)

A. Well, with a Budget Model lamp a person will get an erythema at a 20 to 24 inch distance in about, oh, one and one-half to two minutes, and with the Model M they would secure an erythema in about a one to one and one-half minute treatment time.

You see, it is very difficult to say positively, because the skin of different individuals varies so greatly that no two react exactly the same. For that reason we generally put in the instructions a one minute maximum for the first exposure.

The same is true with the Model H7. The erythema time [70] for the average untreated individual would probably be about a minute.

Q. You mean by that that if an individual has never before used a lamp of this sort, that it would take one minute to produce a perceptible erythema?

A. No. I don't care whether they have used it before or not, but if they haven't used it in the past few months.

Q. And by "untreated" individual, do you mean one whose skin is untanned——

A. That is right.

Q. ——in the natural condition?

A. The normal condition without—well, we wear clothes and when our skin is in a different condition than if we didn't wear clothes, and in its normal condition.

Q. And the skin not tanned by the sun or any other kind of tanning? A. That is right.

Q. Either by the lamp or by natural sun light?

(Testimony of Thomas S. Warren.)

A. Yes.

Trial Examiner Reardon: This is off the record.

(There was a discussion off the record.)

Trial Examiner Reardon: On the record.

By Mr. Lyon:

Q. You say the minimum time would be one minute? A. Yes. [71]

Q. That would be the absolute minimum for the average individual?

A. They should use it that long. That is the minimum period of time for which they use it.

Q. Yes. Ordinarily, you recommend a little longer time?

A. No. I recommend the one minute, as you follow in the instructions. They can increase the time as they feel it necessary in their own individual cases.

Q. Now, these other times that you gave, the one and one-half to two minutes, with the Budget lamp, that would be a longer period of time, would it?

A. Yes, because it is not as strong a light.

Q. That is, all of these different types vary in intensity of light?

A. And they are all controlled by automatic time clocks.

Q. How do those automatic time clocks run?

A. You set the clock for the period of time you want it to run, and then after the clock has been set it automatically turns on the light at the same

(Testimony of Thomas S. Warren.)

time, and then when the time has expired the clock turns off the light, so you get exactly what you set it for. And the maximum time limit for the clock is six minutes.

Q. You mean by that it cannot possibly go for any more than six minutes?

A. That is right. [72]

Q. If a person wants to have it on for any less than that, he has to regulate it?

A. You can set it for one minute, or a half a minute, or two or three minutes, or any other period of time up to six minutes.

Q. And that is true of all of these lamps, the hand lamps?

A. That is right. Each Life Lite lamp is equipped with a time clock.

Q. I notice that *the* you recommend that the first treatment should be not more than one minute. Is that correct?

A. That is right.

Q. And that is increased, the time is increased as the patient continues to use the lamp?

A. As their tolerance for the ultra-violet increases or as their body indicates they can increase the time, but the one minute is less than the minimum amount anybody would ordinarily need, but it is the best and safest treatment time to start with. Most people increase the time gradually so that by the end of a month they are taking five or six minutes. [73]

Q. Now, will you state how these lamps are con-

(Testimony of Thomas S. Warren.)

structed, Mr. Warren? As to the construction of these lamps, how are they made up?

A. You are talking about the quartz tube? [78]

Q. Yes.

A. You don't mean about the stand and the mechanical features?

Q. I want to find out what produces the results.

A. That is the quartz tube.

Q. That is what I want to find out.

A. The quartz tube is a genuine fused quartz tube, bent into the shape desired. It is exhausted of all gases and thoroughly cleaned of all gases, and then filled with a mixture of helium, argon, neon and krypton to a pressure of about 15 millimeters.

There is then added a small amount of mercury, two or three little drops, and the tube is sealed off the pump, and usually it is hermetically sealed. There is no air from the outside can get into it and nothing from the inside can get out except the radiations which are transmitted through the quartz tube.

Now, when that tube is ionized by high voltage of low milliamp., we find the ionization of the mercury vapor inside produces a high intensity of ultra-violet light, which is primarily located in the spectral range of 2537 angstrom units.

Q. This is known as a cold quartz type of ultra-violet lamp? A. That is right.

Q. How does that differ from the hot quartz type? [79]

A. The old hot quartz lamp was a tube that was

(Testimony of Thomas S. Warren.)

six to eight inches long, had a great deal of mercury in it, with three electrodes, and the principle was a low voltage, high amperage electrical arc between the electrodes, and this type of discharge gave a high intensity in the ultra-violet region, far more intense than you can secure per inch from the cold quartz type of tube, and although it emitted ultra-violet rays of very high intensity in this wave length, they were partially absorbed in the vapor before it is transmitted through the quartz, so that they have a higher intensity and they also produce a greater number of bands in the ultra-violet region.

Q. Now, there are other types of ultra-violet lamps, are there?

A. There is the bulb type and also the carbon lamp.

Q. By the way, what technical experience have you had in connection with the making of these?

A. With the making of these?

Q. Yes.

A. I have made tests on the different wave lengths in the different ranges. I have cooperated with laboratories and doctors and in bactericidal tests. I have read every book I could lay my hands on in the last ten years on the subject of Ultra-Violet, and I have had a lot of experience in addition to that. [80]

Q. What is your education?

A. I graduated from Pomona College, taking a course that was generally divided between sci-

(Testimony of Thomas S. Warren.)

ence and general economics, and I had had a very short course from the National School of Physiotherapy, graduating from that in 1931.

Q. And where is that located?

A. Here in Los Angeles. I think it is out of business now. They changed their name, or something.

Q. Your only business has been with the ultra-violet lamps; is that right?

A. No, I have been in other businesses prior to this.

Q. You say you graduated from the National School of Physiotherapy in 1931?

A. Yes. That was a night school course.

Q. That was while you were engaged in other work?

A. Yes.

Q. And you graduated from college when?

A. In 1926.

Q. You have had no other experience or education in this particular type of product, other than you have told us?

A. Well, I worked with one of the men in the physiotherapy department in the County Hospital very constantly for six months. I was with a company at that time that was preparing to go into the manufacture of ultra-violet lamps for dental and medical purposes, and they gave me the full charge of [81] the department, and I was to learn everything that I could, and I spent a great deal of time in some of the hospitals and with the doc-

(Testimony of Thomas S. Warren.)

tors, building up a foundation on which to lay this work.

Q. But you never had any medical training or experience?

A. No, not as far as schooling is concerned.

Q. Did you have any training or experience in using an ultra-violet lamp on other people?

A. Yes, I have, on my own family.

Q. On your own family?

A. That is right.

Q. Have you used it on individual customers, other than your own family?

A. No, sir; except I did nine or ten years ago, under the supervision of a doctor in a couple of doctors' offices, following the instructions of the doctor on some of his own patients.

Q. Now, from your study and experience with reference to sun lamps and therapeutic lamps, would you say that there was an established minimum distance in connection with the use of the lamp, from which to figure erythema time? Would you say that 20 to 24 inches would be the standard, or a distance more than that?

A. I have used that as an arbitrary standard for the stand type lamps. With the hand lamps, it is about a one [82] inch distance.

Q. Isn't it a fact that 30 inches is the standard distance?

A. That is with a bulb type lamp, not a cold quartz type lamp. I think you will find that most

(Testimony of Thomas S. Warren.)

physicians using a cold quartz lamp either use it at a 16 inch distance or about an 18 inch distance.

Q. Well, is 30 inches given ordinarily as a standard from which to determine erythema time?

A. On the bulb type lamp, yes.

Q. How about the cold quartz type lamp?

A. For comparative measurements, but not for treatment purposes.

Q. Just for comparative measurements?

A. That is right.

Q. Now, for comparative measurements on the 30 inch basis, what would you say the minimum perceptible erythema time would be for the use of your stand lamps? A. I don't know.

Q. Calling your attention to the statement in Commission's Exhibit 41-B:

"The minimum perceptible erythema time at 30 inch distance for the Model K is approximately one and one-half minutes; for the Model J one and one-fourth minutes, for the Model M one minute, and the Model IU three-fourths minutes, and the Model P [83] 20 to 30 seconds."

Would you say that that was correct, so far as those particular types of lamps are concerned?

A. Yes. I have told you about the distance of 20 to 24 inches, and this mentions 30 inches.

Q. These lamps are all designed for use at 20 to 24 inches, rather than 30 inches; is that correct?

A. Yes, because it takes too long a time if you are going to have them at 30 inches.

(Testimony of Thomas S. Warren.)

Q. I show you Commission's Exhibit 42, for identification, Mr. Warren, and ask you if you wrote that letter?

(Handing document to witness.)

A. This has reference to the Model A hand lamp only, although it doesn't say so.

Q. You wrote the letter though?

A. That is correct.

Mr. Lyon: I offer this in evidence as Commission's Exhibit 42.

Trial Examiner Reardon: Any objection?

Mr. Tolin: No.

Trial Examiner Reardon: There being no objection, mark it in evidence as Commission's Exhibit 42.

(The letter heretofore marked "Commission's Exhibit 42", for identification, was received in evidence.) [84]

By Mr. Lyon:

Q. Now, you say that this letter refers only to the Model A hand lamp?

A. That is right.

Q. Would the figures given in this letter be any different for your other types of lamps?

A. Very definitely.

Q. Will you state what difference there would be? A. What figures?

Q. The wave lengths, percentage of wave lengths.

A. No, identically the same, so far as that is concerned.

(Testimony of Thomas S. Warren.)

Q. I call your attention to the statement in this letter, as follows: "The spectral range of the Life Lite lamp is exactly the same as that for any standard cold quartz unit, and is as follows:

"Wave length, 2540, 89.2 per cent; wave length 2960 to 3020, .6 per cent; wave length, 3132, 1.8 per cent; wave length, 3660, 1.5 per cent; visible light and heat, 6.9 per cent."

Now, what are referred to there in those numbers, Mr. Warren?

A. Which numbers, the per cent or the——

Q. No, the first numbers I referred to.

A. The angstrom unit wave lengths.

Q. Those are angstrom units? [85]

A. Yes.

Q. And what is an angstrom unit?

A. One fifty-second millionth of an inch.

Q. How is it used?

A. Used as a basis for measurement of visible and ultra-violet radiation, or it is one of the units of measurement for the electromagnetic spectrum.

Q. Yes, that is right. And the statement in this letter that 89.2 per cent of the wave lengths in the Life Lite lamp consist of wave lengths of 2540 angstrom units is correct, is it not?

A. No, 89.6 per cent.

Q. 89.2?

A. 89.2 per cent of the energy from the range is at that wave length.

Q. What is that distinction?

A. You see, 89.2 per cent of the wave lengths——

(Testimony of Thomas S. Warren.)

Q. Of the energy from the wave lengths?

A. Total energy of the output of the lamp is concentrated at that point.

Q. I see. What do you mean by "spectral range"?

A. That is the band or region over which you secure radiation from the particular lamp you are using.

Q. Do you know what the spectral range of the sun is, the natural sun light? [86]

A. Very closely.

Q. What is it?

A. It ranges from 2910 angstrom units to approximately 20,000, I believe, angstrom units.

Q. And the wave lengths in your Life Lite lamps are practically all less than that spectral range?

A. Yes, 89.2 per cent is below that point, yes.

Q. That is right.

A. But that does not mean very much.

Q. Now, you say that the statements in Commission's Exhibit 42 were all with reference to the hand lamp?

A. That is right.

Q. Model A? A. Yes.

Q. And your statement is then that that lamp would produce a perceptible erythema in 15 minutes at a 24 inch distance?

A. No, I think I said 60 minutes, didn't I? Isn't that the question they asked me?

Q. Well, I will show you this letter to refresh your memory. A. Yes.

(Handing document to witness.)

(Testimony of Thomas S. Warren.)

A. Oh, yes. It produces a far more than a perceptible erythema in 60 minutes at a 24 inch distance.

Q. And in your opinion, would it produce a perceptible erythema in 15 minutes at a 24 inch distance? [87]

A. That is right.

Q. But you recommend this only to be used at a one-inch distance?

A. Yes, very definitely.

Q. At that distance it would——

A. The intensity varies inversely to the square of the distance.

Q. I believe you stated previously that for the recommended distance of one inch it would produce an erythema in ten to twelve seconds?

A. On the underpart of the forearm.

Q. Why do you specify the underpart of the forearm?

A. Because that is used as a testing basis. For a person, an individual, you wouldn't consider that except for test purposes. People treat themselves ordinarily on the stomach or chest, not on the forearm.

Q. You think that the underside of the forearm would be more sensitive than any other part of the body?

A. It is as sensitive as any other part of the body.

Q. Would it be as sensitive as the chest or stomach?

A. No. The stomach is less sensitive. The inside of the thigh is equally as sensitive. The under-

(Testimony of Thomas S. Warren.)

part of a woman's breast is as sensitive, but all other parts of the body are less sensitive.

Q. Would you say that at a 30 inch distance your various [88] models of stand lamps would produce a perceptible erythema in times varying from one minute to one and one-half minutes? Would that be approximately correct?

A. Yes, on the average individual, I would say so.

Q. Would it possibly be any less than one minute?

A. There are certain very thin skinned, red headed individuals, whose reaction to ultra-violet is—well, they can hardly stand out in the sun light. Most of them know about it and realize what they get, know their sensitivity, and are careful. In fact, most of them don't have to be told.

Q. And that varies also in whether a person is a blonde or a brunette?

A. As an average individual, I refer to an average brunette, not a blonde.

Q. And the blondes are more susceptible?

A. That is correct, and so stated in the instruction sheet.

Q. It would take less rays of the lamp to produce a corresponding sun burn on a blonde than on a brunette?

A. Yes.

Q. And your instructions are based on the average brunette; is that correct?

A. That is correct.

(Testimony of Thomas S. Warren.)

Q. Now, do you recognize the distinction between a sun lamp and a therapeutic lamp?

A. I have read the distinction that is given as the opinion [89] of medical authorities, yes.

Q. And is that your opinion also?

A. Probably should be.

Q. What is that distinction?

A. That lamps which produce a radiation above 2800 or 2900 angstrom units are considered sun lamps, and those producing radiation shorter than that are considered therapeutic lamps. It is a very arbitrary method of standardization.

Q. That is, the rays of the sun are in the spectral range of more than 2900 angstrom units; is that correct? A. Yes.

Q. And they vary from that up to about how much, would you say?

A. Roughly, about,—I believe it is about 20,000 angstrom units.

Q. Well, isn't it true that they vary generally from 2900 to only approximately 3130 angstrom units?

A. We are talking about ultra-violet?

Q. Yes, the ultra-violet rays of the sun.

A. The ultra-violet rays of the sun begin at 2900 and go continuously clear on through the whole ultra-violet range.

Q. Do you not make a distinction between the ultra-violet spectrum and the sun's rays?

A. Yes.

Q. What distinction? [90]

(Testimony of Thomas S. Warren.)

A. The ultra-violet is only about—from 4000 angstrom units, which is the upper limit of the ultra-violet region. That is where the limit of visible light is, and from there on is the ultra-violet region, and the ultra-violet region between 4,000 and 3,200 is apparently negative so far as actinic or chemical effects on the human body are concerned. From 3200 to 2900 they start getting chemical effects from the ultra-violet rays, and you continue those same ultra-violet effects in the shorter regions. It does not make any difference whether the sun's rays stop there or not. That has nothing to do with it.

Q. I am just asking if you know there is a distinction so far as the sun's rays are concerned.

A. There is a distinction only in so far as the American Medical Association has said there is.

Q. I believe you stated that was your opinion also?

A. No. I stated the distinction, that possibly there should be a distinction between lamps of longer wave lengths, and those producing shorter wave lengths. I think that is all right.

Q. That is, there is a distinction between a sun lamp and a therapeutic lamp?

A. Yes, on the basis of that definition, and the definition is probably all right.

Q. And the definition you refer to is that the ultra-violet [91] rays of the sun are in a spectral range from 2900 to approximately 3200 angstrom units?

A. Those are the actinic rays.

(Testimony of Thomas S. Warren.)

Q. The actinic rays?

A. The chemically acting rays.

Q. And there are some other rays that do not have——

A. There are other ultra-violet rays that have no effect on the human body, so far as I know.

Q. As far as the sun is concerned, the only rays that have any effect are between 2900 angstrom units and approximately 3200?

A. No. The only ultra-violet rays from the sun that have any effect on the body——

Q. I mean, the ultra-violet rays. A. Yes.

Q. You will have to excuse me for not being a technical expert along this line.

A. That is all right.

Q. I believe you state in your literature that your lamps are therapeutic lamps; is that correct?

A. We have tried to do that all the time. Once in a while we slipped up in one or two places, but it has not been our intention to classify them as a sun lamp at any time.

Q. You do not at the present time make any claim that you have a sun lamp? [92]

A. No, not a bit; neither verbal, nor written, nor in any way.

Q. Would you know what the standard of the American Medical Association is with reference to the sun lamp? That is, what kind of a lamp should be classified as a sun lamp, based upon the time of erythema and the distance at which the lamp is to be used?

(Testimony of Thomas S. Warren.)

A. I can't give you that exactly, and I would rather not.

Q. Yes.

A. I have the information in my files, but not in my mind.

Q. Now, Mr. Warren, will you state what the reason, if any, is for the differentiation between a sun lamp and a therapeutic lamp? Why is there that distinction made, do you know?

A. The reason that it is made is, I think, largely a commercial reason. The results from the therapeutic rays shorter than sunlight, or the therapeutic rays larger than the limits of the sunlight spectrum are more or less the same, depending on the intensity from the different wave lengths. The reason that there is the distinction, and the reason for the distinction, I think, is so that certain light sources which duplicate—not duplicate, because none of them duplicate, but certain light sources that have the highest intensity in the wave lengths similar to the bands we receive from sunlight are ones which give—well, they just more nearly resemble the sunlight than the lamps [93] producing shorter waves. There is no reason why they should not be called sun lamps. There is no reason why the lamps producing shorter wave lengths cannot give the same results either.

Q. Well, is it or is it not a fact that the shorter the wave lengths the less time it takes to produce a perceptible erythema of the skin?

(Testimony of Thomas S. Warren.)

A. That is true.

Q. Would it be true that a sun lamp would be less severe on the skin, have a less severe action than a therapeutic lamp?

A. No, not a bit. What difference does it make whether it takes two minutes or it takes 15 minutes?

Q. It would take a longer time to get the same result from a sun lamp, is that right, than a therapeutic lamp?

A. Yes.

Q. Isn't it true that the minimum time in which a person can obtain a perceptible erythema from the use of a sun lamp would be an hour?

A. That is what the American Medical Association thinks, but I don't have to agree with them.

Q. But is that your personal opinion?

A. No.

Q. That is the recognized standard, is it not?

A. That is what they have tried to establish as the [94] recognized standard.

Q. And anything less than that time is classified as a therapeutic lamp rather than a sun lamp?

A. No, I don't think so, because you have your Burdick lamp, which is classified as a sun lamp, and you can get a perceptible erythema from the Burdick lamp, or from the G.E. bulb lamp and you will have quite an erythema in five minutes. And the Hanovia sun lamp produces the very short wave lengths and therapeutic bands, just like the cold quartz, and will give you a perceptible erythema in one to two minutes.

(Testimony of Thomas S. Warren.)

Q. Are your lamps designed for use without the supervision of a physician?

A. We believe so, yes.

Q. That is, they are designed for use in the home by the average individual, without having any particular medical training?

A. I think they are perfectly so.

Q. And you recommend them for that use?

A. I would be glad to. [95]

DR. SAMUEL AYRES, JR.

was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination [97]

Q. Will you state your name, please?

Trial Examiner Reardon: Just a minute. This witness is called out of order, the cross examination of the previous witness having been deferred.

Mr. Lyon: That is correct.

Trial Examiner Reardon: Now, the question is your name.

The Witness: Samuel Ayres, Jr.

By Mr. Lyon:

Q. Where do you live, Doctor Ayres?

A. 4657 El Camino Corto, LaCanada.

Q. What is your profession?

A. Physician.

(Testimony of Dr. Samuel Ayres, Jr.)

Q. Will you state in as much detail, as you care to, your experience and education as a physician?

A. A.B., University of Missouri, 1915; M.D., Harvard Medical School in 1919; interneship, Massachusetts General Hospital; graduate assistant in dermatology, six months at the Massachusetts General Hospital; practiced in Los Angeles, limited to diseases of the skin, since October 1920.

Q. You have been practicing here as a specialist in skin diseases since 1920; is that correct? [98]

A. That is right.

Q. Now, Doctor, for your information, the product involved in this case is known as a Life Lite Lamp, L-i-f-e L-i-t-e, the trade name, and is a cold quartz type of lamp, in which a mercury are is burned in quartz. Are you familiar with that type of lamp? A. Yes.

Q. Will you state what experience, if any, you have had with the use of such a lamp?

A. I have employed a lamp of that type in my own practice for a period of approximately eight or ten years, or about as long as that particular type of lamp has been manufactured. I have forgotten the exact time in which I used it for the treatment of certain skin diseases.

Q. Now, for your further information, it has been testified that the respondent company produces and sells two general types of lamps; one, a hand lamp, and the other a stand lamp, and I show you the directions for the use of one type of hand lamp which is in evidence as Commission's Exhibit 1, and

(Testimony of Dr. Samuel Ayres, Jr.)

ask you to base your testimony on the assumption that the lamp is used under those directions.

Mr. Tolin: Do you mind if I read over your shoulder, Doctor?

The Witness: Not at all. Now, what was your question? [99]

Trial Examiner Reardon: Read it, please.

(The question was read by the reporter.)

By Mr. Lyon:

Q. That was simply a remark to the effect that those are the directions for the use of this particular lamp. A. Yes.

Q. And the directions for the use of the stand lamps are similar, with the exception of the distance from the body at which they are to be used, and the directions are 20 to 24 inches in the case of the stand lamp, and one inch from the body in the case of the hand lamp. Assume also for your testimony, Doctor, that the wave lengths of the ultra-violet rays produced by this lamp are as follows: 2540 angstrom units comprise 89.2 per cent of the spectral range of the lamp; 2960 to 3020 angstrom units, .6 per cent; 3132 angstrom units, 1.8 per cent; 3660 angstrom units, 1.5 per cent; visible light and heat, 6.9 per cent.

Now, having those various facts in mind, what would you say would be the effect of such a lamp, used as directed, upon the skin of the average individual?

A. Oh, I think as the increase of the time element came into play, there would probably be a cer-

(Testimony of Dr. Samuel Ayres, Jr.)

tain degree of redness of the skin. I would say that probably would depend on how long the lamp was held at any one particular point.

Q. I might say that the directions call for the moving of [100] the lamp over the skin in a continuous movement.

A. For one to two minutes.

Q. Yes, for not more than six minutes at any one particular time.

A. Yes. There might be perhaps a very slight redness. It would depend somewhat upon the sensitivity of the skin, but I would estimate to start with that a time of one to two minutes, moving the lamp continuously over the chest and abdomen, might be enough to produce a very faint pink color.

Q. Would you say that such a lamp would be a sun lamp or a therapeutic lamp?

A. I would say it would be a therapeutic lamp.

Q. And for what reason?

A. Well, because it doesn't contain the full spectral range that the sunlight, the natural sunlight would produce.

Q. And what is the spectral range of the sun?

A. I don't recall the full spectral range, but it has a much—includes many more of the longer wave lengths than this general type of lamp would give.

Q. Are the shorter wave lengths harsher in their effect on the skin than the longer wave lengths?

A. Yes, the shorter wave lengths produce the redness or erythema, and with that type of lamp

(Testimony of Dr. Samuel Ayres, Jr.)

you don't get, as a rule, the tanning that you get with the full spectrum as [101] given by the sun.

[102]

Q. What experience have you had in the general field of medicine?

A. My work was entirely limited to skin diseases, other than my training period.

Q. All right. I will withdraw that question. Would you say that such a lamp would give benefits to the skin and to the general health of the individual, comparable to that given by general sunlight?

Mr. Tolin: Objected to on the same ground as the last question.

By Mr. Lyon:

Q. I will confine the question, first, to the benefits to the skin.

A. No, I don't think it would.

Q. In your opinion, would it give a benefit to the general health of the individual, comparable to that given by natural sunlight?

Mr. Tolin: That is objected to on the ground that the witness has testified that his practice is limited and [104] has been limited since his training period to dermatology, which is a specialty and does not concern the general health of the subject. Hence, he has shown himself not to be qualified to express an opinion upon the effect of this light upon general health.

Trial Examiner Reardon: Off the record.

(There was a discussion off the record.)

(Testimony of Dr. Samuel Ayres, Jr.)

Trial Examiner Reardon: I will overrule the objection.

Mr. Tolin: Then I will object to it on the ground that it does not appear that the witness has ever used or studied ultra-violet light with respect to the general practice of medicine. He has testified that lights of this kind came to his attention when they first came out some eight or ten years ago, that he took an M.D. degree at Harvard in 1919, which would have been prior to that date, and that in his entire practice he has been limited to dermatology, and hence that the advent of this product, within his own testimony, has come about since he has had study or instruction or practice in the field of general therapy.

Trial Examiner Reardon: Well, he has testified to his familiarity with the appliance in question, and I will overrule the objection.

You may answer. [105]

Mr. Lyon: Will you read the last question again, please?

(The question was read by the reporter.)

The Witness: From direct personal observation, I am not able to answer the question, but from general impression and from literature, I would say that it probably has not the same effect that you would get from the sunlight, in particular, that you lack the tanning procedure, and that is considered to be intimately connected with certain of the benefits of the natural sun.

Mr. Tolin: I move to strike the answer upon the

(Testimony of Dr. Samuel Ayres, Jr.)

ground that by the witness' testimony it is based upon hearsay and speculation.

Mr. Lyon: It is based on his general knowledge, I understand.

Trial Examiner Reardon: I think on his qualifications, I will have to deny the motion.

By Mr. Lyon:

Q. Would you say that such a device would have any therapeutic value to the doctor?

A. Yes, I think a very definite one.

Q. What would be the therapeutic value of such a device?

A. This particular type of a lamp I think is useful in the treatment of several skin diseases. I think it has a very limited field of usefulness, but I think it is parti- [106] cularly beneficial where one desires to secure a prompt erythema without peeling, such, for instance, as in the treatment of alopecia areata or pityriasis rosea, and perhaps some masses of psoriasis.

I think it is useful and could be used in certain types of superficial eruptions due to bacteria, but I don't believe the light by itself is likely to produce a cure in conditions like psoriasis or eczema or athlete's foot, or things of that sort.

Q. So far as its bactericidal action is concerned, what would that be confined to, if anything?

A. Chiefly——

Q. To what?

A. Chiefly, staphylococcus, and that type of bacteria which is right at the very surface of the skin.

(Testimony of Dr. Samuel Ayres, Jr.)

Q. To surface bacteria?

A. Surface bacteria, yes.

Q. In your opinion, would it be of any value in the treatment of chronic skin infections?

A. I think it again has a limited field of usefulness in such chronic—you say “skin infections” or “affections”?

Q. Infections.

A. Infections. I don't know of any chronic skin condition which would be improved by it or benefited by it other than perhaps a stimulating effect, such as perhaps in the [107] case of a chronic ulcer, but I doubt very much if the light by itself would be sufficient to bring about a cure in even such a condition. It might be of some value in stimulating granulation tissue.

Q. What would you say as to its value in cases of ringworm? [108]

A. I think its value in ringworm would be very little, personally. Ringworm is a fungus infection and forms spores, and those spores are very resistant to therapeutic measures. They may remain alive even exposed to just sunlight for long periods of time, and, for instance, an infection, a ringworm infection, between the toes like athlete's foot, well, it would not be possible for the light to strike the areas adequately, on account of their position, to exert much of a therapeutic effect.

Q. What would be your opinion as to the usefulness of such a device in the treatment of athlete's foot?

(Testimony of Dr. Samuel Ayres, Jr.)

A. I don't think it would be. It is not a proper means of treating athlete's foot.

Q. Do you think it would be of any value at all?

A. I doubt it. [109]

Q. Would such a device be of any value in the treatment of acne?

A. I think it would be of very little value in the treatment of acne. Acne is a condition that comes on during adolescence, due to an over activity of the oil glands and the formation of blackheads, and that is the basis for the blebs, the pustules, and pimples, which are due to bacteria that will grow in such a skin that would not grow in a clear skin, and, therefore, the use of a light on this sort of skin could not do any more than produce a peeling and a temporary stimulating effect, but it would not in any way change the underlying condition of the skin, that is, the formation of the blackheads and the oiliness.

I would say its effect in acne would be very small. It is sometimes used as a supplement to other forms of treatment, where a person, for instance, has had the proper amount of x-ray and if there happens to be some acne still left, an ultra-violet light is sometimes added, but it is not the method of choice. And of the types of ultra-violet light, [110] I personally have seen better results from the other types of quartz lamp, which give the longer wave lengths.

Q. You mean by that the so-called hot quartz?

A. Yes, with the tanning. I think you get a little better effect on acne when you use that type.

(Testimony of Dr. Samuel Ayres, Jr.)

Q. How about eczema? Would it be of any value in the treatment of that?

A. It may be of some temporary value in eczema, although I don't think it is of sufficient value to effect a cure from it. Eczema is simply a symptom of a disease of the skin, just like a headache is the symptom of other ailments of the body, and eczema can be due to so many different causes that without finding out the underlying cause, it is perfectly futile to try to treat it.

In other words, you can have eczema due to external causes, from soap that people use in washing dishes, and things of that sort, from which they get a chemical condition, and eczema may be due to food sensitization. There are many, many things that can cause the symptom we call eczema, and without finding out what is underlying the condition, it would be perfectly futile to try to treat it with any measures such as this. The most it can do would be to give a certain degree of temporary relief, although personally I haven't found that its value is enough to employ the lamp in that condition myself. [111]

Q. In your opinion, it would be necessary or advisable for a person having eczema to obtain a diagnosis and treatment by a qualified physician?

A. I think it certainly would, in order to expect any definite results.

Q. I believe you mentioned psoriasis a while ago.

A. Yes.

Q. What exactly is the value, if any, of such a device in the treatment of psoriasis?

(Testimony of Dr. Samuel Ayres, Jr.)

A. Well, psoriasis is another skin condition, the cause of which is entirely unknown. It is characterized by reddish thickened patches that occur on various parts of the body, covered with a heavy scale. Sometimes psoriasis will come out rather acutely, come out rapidly over various parts of the body, and an acute case of psoriasis would be definitely aggravated by using ultra-violet light sufficient to produce an erythema.

On the other hand, chronic psoriasis, where there are long standing thickened patches could be definitely benefited by ultra-violet light of either type, although again I feel the hot quartz is preferable.

Q. In your opinion, would the average lay individual be able to diagnose his own particular condition of psoriasis, so as to enable him to use such a device with effectiveness?

A. I don't think he would be able to diagnose it himself, [112] unless he had been told by some physician that he had psoriasis.

Q. And it would be necessary to use a lamp under the supervision of a physician in such a case?

A. I would believe it should be. [113]

Q. Would such a device as the respondent's product be of any value in the treatment of sores and ulcers?

A. Yes, it might be of some value in the treatment of certain chronic ulcers, by way of stimulating cicatrization, but again one would have to know what the ulcer was caused by. You could have an ulcer due to syphilis and no amount of light would

(Testimony of Dr. Samuel Ayres, Jr.)

do it any good. Or you may have an ulcer due to cancer and the use of the light might even aggravate it.

Q. It would be necessary to have the diagnosis of a physician in all of these cases?

A. Very definitely.

Q. What would you say as to the value of such a device in the treatment of bacterial skin diseases?

A. Probably of slight benefit. I think that question has been answered already. Probably of slight benefit, as in [114] impetigo, and in other ways.

Q. In bacterial infections?

A. Provided it is supplemented by such action as opening the pustules and removing crusts, and that sort of thing, and with the use of proper local medication in between the light treatments. In other words, I would not for a minute depend on the use of a lamp for the sole treatment of the thing.

Q. What are the generally recognized causes of skin diseases, Doctor?

A. They are just as varied as the causes of disease in general. Skin diseases can be caused by external infection of bacteria, external infection of fungus or ringworm, external infection of animal parasites, like scabies; internal fection with bacteria, such as shingles or tuberculosis; external sensitivity to contact with dyes in clothing, and through contact with things that a person handles in the course of his work; internal factors, such as sensitivity to certain foods or pollens; disturbances of metabo-

(Testimony of Dr. Samuel Ayres, Jr.)

lism, and a whole host of skin diseases, the causes of which are entirely unknown.

Q. Are many of those germs or organisms or bacteria found on the surface of the skin or beneath the outer surface of the skin?

A. Well, I don't know that I could say "most." In the [115] diseases of the skin that are due to bacteria, about the only one in which it is found right on the surface is impetigo. In most of the others the infection lies deeper; as in barber's itch, it is in the hair follicle and it burrows its way deep into the hair follicle.

Q. In the case of those infections which are deeper and below the surface of the skin, what is your opinion as to the value of such a device?

A. I don't think it would have any particular value, because most of the rays of the light are filtered out by the upper skin layers.

Q. Would you say that such a device would stimulate the tissues of the skin?

A. Under certain conditions it might stimulate the tissues. It depends on what you mean by "stimulate."

For instance, it might have this effect on some ulcerations. It might stimulate the formation of new granulation tissues.

In the case of acne, especially at the conclusion of a series of x-ray treatments, if there might be a few remnants left over, enough of this light to cause vigorous peeling might produce a slight benefit, but I don't think that it would do more than that.

(Testimony of Dr. Samuel Ayres, Jr.)

As to stimulating, I don't think you get any great deal of stimulation—I will put it this way: The effect [116] of producing the redness means that the blood vessels are dilated, and there might perhaps be some degree of stimulation in that regard, but I don't think that it would have any lasting effect or be of any particular value in the conditions that have been mentioned, other than in stimulating new granulation in ulcers, perhaps.

Q. Would you say the use of such a device would build up resistance in the body against disease?

A. I think that is a very difficult question to prove one way or the other. I think it would be very difficult to prove that, and from the best opinions that I have been able to find, those resistances are more apt to be built up under conditions of radiation simulating the natural sunlight, where there are more of the longer wave lengths producing tanning.

Q. In your opinion, would it produce any chemical reaction in the body, so far as the blood is concerned?

A. Well, it might perhaps improve the calcium metabolism to some degree. I wouldn't want to say how much.

Q. Would you say that it would make an improvement in the metabolism?

A. I wouldn't be willing to say. I don't know just how much benefit you could get from it. I think it is unquestionably proven that natural sunlight does have a generally stimulating effect on

(Testimony of Dr. Samuel Ayres, Jr.)

metabolism, improves the [117] calcium acceleration, perhaps improves the appetite and affects the general well-being of the body, but I don't believe that you could expect to get the same effect from this type of radiation.

Q. In your opinion, would it aid in overcoming a deficiency of the white or red corpuscles?

A. I couldn't answer that. I wouldn't know whether it would or not.

Q. In your opinion, would it produce a tonic effect on the blood?

A. That is too vague a question. I don't know what that would be.

Q. That is not a medically recognized term?

A. No.

Q. In your opinion, would it stimulate the endocrine glands?

A. I don't see how it could, particularly.

Q. In your opinion, would it quiet and soothe the nerves or the nerve endings in the skin?

A. Possibly to a very slight extent, but again I don't think—it is such a vague term that if you mean would it allay itching or would it allay pain, I doubt very much if you would get a very great effect from it. In fact, there are some conditions in which the itching might be made much more intense. For instance, you take a condition like hives or urticaria and expose it to ultra-violet light, and I would [118] anticipate that you would get an increase in itching rather than a lessening of the itching.

(Testimony of Dr. Samuel Ayres, Jr.)

Q. Would you say that such a device would act as an anti-acid or have an equalizing effect upon the body?

A. I have never heard of any such effect from it. [119]

Q. How about sores? I think we coupled sores and ulcers. Is that a proper coupling, or should they be distinguished?

A. I think they should be distinguished, because a sore is a very general term. A boil would be a sore, but it certainly is not an ulcer.

Q. Would such a device be of any assistance in the treatment of sores?

A. I don't think it would be of very much value in the treatment of sores, no, in using the term in its general scope.

Trial Examiner Reardon: Using it with reference to boils? [120]

The Witness: No, I don't think it would be of any particular value.

By Mr. Lyon:

Q. Would you say that such a device would heal most skin diseases?

A. No, I don't think it would heal most skin diseases. It would heal a very small number of them.

Q. And the same answer would be true also with reference to healing most skin diseases safely, quickly and easily?

A. Why, I doubt if it would heal hardly any

(Testimony of Dr. Samuel Ayres, Jr.)

skin diseases. I think it might be of benefit in a certain few, but as to actually healing, I doubt if it would heal very many.

Q. What would those certain few conditions be that it would assist in healing?

A. The few skin diseases in which, in my experience, this type of radiation would be of some value would be in alopecia areata——

Trial Examiner Reardon: What is that in plain English, Doctor?

The Witness: That is a type of baldness, in which the hair comes out in spots.

Trial Examiner Reardon: It knew what it was, but I wanted the record to show it.

The Witness: The cause isn't definitely known and sometimes the patches heal of their own accord, but there are [121] certain cases in which the condition is prolonged, and vigorous stimulation, such as you could produce by a redness and peeling from such a lamp, would be of value, but you could get the same effect by painting it with iodine or certain other things.

Another is pityriasis rosea. That is another condition characterized by red spots that occur on the skin. The cause is not known. The disease itself is limited anyway and if left to its own devices, it would heal up in about four to six weeks. With the use of this particular radiation, over the entire body, with a sufficient dosage to make the skin definitely red and peel, the disease would respond in probably two weeks. That is the one disease in

(Testimony of Dr. Samuel Ayres, Jr.)

which I feel it would be of value, and that is pityriasis rosea.

And in the case of psoriasis, it is of some value, along with other measures, provided you are not developing an acute attack, because in acute cases it would be apt to aggravate rather than benefit it.

Then, as mentioned before, in certain types of chronic ulcers, provided they are not due to syphilis, they might be benefited by properly supervised and administered stimulating doses.

And acne in a minority of cases would be somewhat benefited by a sufficient dose to cause redness and peeling, but I don't think the effect is as satisfactory as one could [122] get from the natural sunlight down at the beach in the summertime, and it would not in any way remove the underlying cause of acne, which is a disturbed function of the oil glands.

Mr. Lyon: I think that will be all. You may cross examine.

Cross Examination

By Mr. Tolin:

Q. Doctor, isn't it your opinion that all disease is properly a subject for treatment by a physician rather than home treatment?

A. I think that is correct. I would say supervision.

Q. Now, have you examined the particular light product that is in issue now before the Commission?

(Testimony of Dr. Samuel Ayres, Jr.)

A. I have not examined the apparatus, no. [123]

Q. Now, how long have you used ultra-violet light in your professional work?

A. I have used ultra-violet light as long as I have been in practice, which is about 20 years.

Q. This particular type, that is, light that comes from a device emanating 2537 angstrom units?

A. You mean this cold quartz type of light?

Q. Yes.

A. Since about the time it was first introduced, which I think was about eight or ten years ago. I don't recall exactly.

Q. When you say "cold quartz light", do you mean ultra-violet light of approximately 2537 angstrom units? A. Yes.

Q. All cold quartz light is about of that unit?

A. I think that is about correct.

Q. Your practice has been generally in the field of treatment of skin disorders, has it not?

A. Yes. [125]

Q. Don't you feel, Doctor, that a person who was not experiencing any particular skin disorder, but who would have used a light of this type habitually, say, once a week or so for a considerable period of time, would be less apt to develop a skin disorder than one who did not subject his skin to such treatment?

A. No, I don't think that is true, and I think certain type of skins using such a light over an indefinite period of time might develop certain harmful effects.

(Testimony of Dr. Samuel Ayres, Jr.)

Q. You mean principally, don't you, that if a person had a skin disease of a certain type and it was in a latent state, that it might be brought into an active state by the use of light?

A. Partly that, and also the fact that individuals who are of fair skins and are exposed to a good deal of actinic rays might get or are prone to develop rough patches or scaley patches on their skin, which we call senile keratoses and epitheliomas. That results too from undue exposure to natural sunlight in people who are unable to tan. I don't think this lamp has been on the market long enough to say that if a person used this lamp for a long period that that would result, but all theoretical signs of the characteristics of the apparatus, which seem to depend on erythema and which is best in people who normally tan or in dark skinned people, I would assume this sort of a device used over a prolonged period might [126] perhaps bring about undesirable effects over a period of years.

Q. Doctor, have you ever known it to do so?

A. No, because the lamp has not been in use long enough.

Q. It has been in use for nine or ten years?

A. It still isn't long enough, and its widespread use in the home isn't very extensive. I am just citing that as a possibility. I think we know very definitely that fair skinned people who go to the beach and who are light sensitive will develop this rough dry skin and get these characteristics which I have recited, and which might degenerate into

(Testimony of Dr. Samuel Ayres, Jr.)

cancer; that is, people who can't tan, and that is due to the ultra-violet radiation.

Obviously, this light doesn't provoke tanning, and it is desirable when you produce erythema and peeling, and it is just conceivable that such an effect might take place.

I think for that reason it is not a desirable thing to turn loose on the public.

Q. You are indulging in speculation there, Doctor, aren't you?

A. That is what it is. I am drawing deductions from known facts, however.

Q. However, in your earlier testimony you have told us that the radiation of this light is not comparable to natural sunlight, haven't you?

A. That is correct. [127]

Q. And now you are drawing a parallel between a condition which developed on persons exposing themselves to sunlight, to natural sunlight for long periods of time and being persons who do not pigment well, aren't you?

A. Well, merely the fact that natural sunlight provokes tanning, and the tanning prevents injury by the shorter wave lengths. Negroes and dark skinned do not show this injury from the short wave lengths. People with fair skins, who can't tan, show the injury, and it is probably due to the short wave lengths, and the short wave lengths predominate in this type of radiation.

Q. Well, the tanning is a definite reaction of the skin?

A. That is right.

(Testimony of Dr. Samuel Ayres, Jr.)

Q. And tanning does occur with natural sunlight? A. Yes.

Q. And natural sunlight does not contain rays of the length that emanate from this type of light, does it?

A. I think it contains wave lengths of all lengths. I think that a certain amount of this radiation that is contained in natural sunlight is present, but the amount in proportion to the total radiation is relatively small.

Q. Is it so small that it has never been measured, according to any of the tables or charts in authoritative works? A. I don't know.

Q. Can you cite us to any authority which does say that [128] radiation in the wave lengths that come from this type of light, cold quartz, do exist in natural sunlight?

A. I think that would be a question for a physicist to answer.

Q. Then that is something about which you are merely speculating, so far as your testimony here is concerned? A. That is right.

Q. You don't know, do you, whether cold quartz light will cause any activation of vitamin D in the human body?

Mr. Lyon: I object to that inasmuch as it was not covered by the direct examination, and is not proper cross examination.

Trial Examiner Reardon: I overrule the objection.

The Witness: I can't tell you how much

(Testimony of Dr. Samuel Ayres, Jr.)

activation the cold quartz will produce of vitamin D. I don't think there is any question that it produces some, but I don't know what the amount would be compared to what one would get from the natural sunlight. I don't think it would be so much.

By Mr. Tolin:

Q. Of course, in this matter we are not saying that this light is a miniature sun, in any way, but you are aware that it does produce some vitamin D activation?

A. I am not aware of it. I have understood that it does. That is my impression. [129]

Q. And you have gained that impression from the standard treatises and publications that are of good repute within the medical profession, haven't you?

A. Yes. [130]

Q. In answering a question about the harshness of short rays, as compared to long rays, you said that—I think you did, and if you didn't, correct me—that redness was caused by the short rays, but is it not true that redness is also caused by the long rays from hot quartz, and by [134] sunlight as well?

A. It certainly is. The redness may be caused by heat also, for that matter, but the type of redness that comes on within a few hours and lasts for a period of several days is usually due to the shorter waves, and in this particular type of cold quartz there is a higher proportion of those short waves which produce the redness and which do not cause the tanning. The tanning is produced by

(Testimony of Dr. Samuel Ayres, Jr.)

the longer waves, and which, naturally, the hot quartz also can do, both in the shorter and longer waves.

Q. Generally speaking, is erythema considered beneficial to the human body,—mild erythema?

A. I think it depends on the type of skin you are dealing with. I don't believe erythema from the sunlight is necessarily beneficial in a very fair skinned individual, unless—well, I just don't think to give him an erythema is necessarily a good thing.

Q. A simple erythema is not, however, ordinarily harmful, is it? A. No. That is right.

Q. It is one of the natural incidents of life?

A. That is right.

Q. To persons who go into the sun?

A. That is right.

Q. Generally speaking, under medical theory at the present [135] time, that is, the preponderance of medical theory, it is beneficial to people to go about into the sunlight, is it not?

A. Within moderation, and depending on the type of skin you have.

Q. With a little experience, a person can find out whether it is beneficial or harmful to that particular person, can he not?

A. Usually, although an individual might—with a fair skin might get a lot of ultra-violet radiation, either from a lamp or the sunlight, and eventually might get harmful effects and he might not appreciate the fact that he was getting harmful effects until a number of years later when the accumula-

(Testimony of Dr. Samuel Ayres, Jr.)

tive action shows up and he begins to get the dryness which is characteristic of what we call senile keratosis, which is due to an accumulated effect of erythema, so that I don't believe it is altogether without harmful effects.

Q. The only way a person can tell would be to go to a person specializing in dermatology, is that right? A. Well, no, I don't think so.

Q. Well, how else can we tell whether we are in for this disease which you have just mentioned, senile something or other, without consulting persons of your particular branch of specialty in the medical profession?

A. Well, I think probably a dermatologist would be the [136] best qualified to give a person advice about his skin, but I think any competent physician would appreciate the fact that people with very fine skins, who get repeated erythemas from ultra-violet light, from whatever source, over too long a period of time are liable to develop these undesirable effects. [137]

Redirect Examination [141]

By Mr. Lyon:

Q. Do you prescribe the use of these cold quartz lamps under any conditions, in your own practice?

A. Yes, in my own office.

Q. For what condition?

A. Alopecia areata and pityriasis rosea, certain types of chronic ulcers, a limited number of cases of acne and psoriasis, and I think that about covers the list.

(Testimony of Dr. Samuel Ayres, Jr.)

Q. Those are all used under your own supervision in your own office?

A. Those are all given under my own supervision, in conjunction with other things.

Q. Do you recommend a person using such a device in his home, when such a condition or disease has been diagnosed by you?

A. I haven't particularly recommended its use, because, as a rule, that particular treatment by itself is not sufficient. If the patient brings up the question of using a lamp at home to supplement the treatment, I have considered the feasibility of doing it and under proper safeguards, but, as I say, the question has only come up on several occasions, not more than one or two, where I can recall that a person has proposed to carry out such treatments at home. [145]

Recross Examination

By Mr. Tolin:

Q. Doctor, what is photosensitization? What is meant by that? [149]

A. Photosensitization means that an individual's skin, either from birth or as the result of some change, has become hypersensitive to light, in other words, reacts in an abnormal condition, different from the action of the normal skin.

Q. That is the condition that exists in this disease that you mentioned in your examination a while back, in which the disease is aggravated by light, is it not?

(Testimony of Dr. Samuel Ayres, Jr.)

A. Oh, if you are going into the question of photosensitization, it opens up quite a subject. There are a number of conditions that could come up under the term "photosensitization," in which a disease factor could actually be produced by light, as well as one which could be aggravated by light.

Q. Photosensitization then is just about the maximum term to use to cover all of those conditions in which a person might be abnormally sensitive to light, such as would emanate from cold quartz?

A. No, it does not cover them all.

Q. What word does?

A. An acute—well, photosensitization means they are merely light sensitive, they are allergic to light in the same way that a person is hypersensitive to egg, or anything else, but there are certain conditions in which there is no element of photosensitization. For instance, like in the [150] case of acute psoriasis, in which an erythema dose of light just might provoke a case of severe dermatosis, and I would say probably the condition you get in elderly people characterized by senile keratosis, and so on, is not so much a matter of photosensitization as it is due to the lack of ability to tan. It is not a matter of being light sensitive. It is just the fact the skin does not contain the pigment cells to tan.

Q. Is psoriasis a form of disease?

A. Yes. Dermatitis merely means inflammation of the skin, and psoriasis is one of the infectious diseases of the skin. [151]

(Testimony of Dr. Samuel Ayres, Jr.)

Certificate

This is to certify that the attached proceedings before the Federal Trade Commission in the matter of: Docket No.—4407 Case Title — Ultra-Violet Products, Inc., a corporation. Place — Los Angeles, California Date—May 28, 1941 were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

ETHEL E. FISHER & ASSO-
CIATES, INC.

Official Reporters

By D. MacMILLAN

Assistant Secretary

DR. FRED B. MOOR

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lyon:

Q. State your name and residence address.

A. Fred B. Moor, 239 South Charlotte Avenue, San Gabriel.

Q. What is your profession?

A. Physician.

Q. Where is your office?

A. 312 North Boyle Avenue, Los Angeles.

Q. Will you state your experience and education as a [165] physician?

(Testimony of Dr. Fred B. Moor.)

A. I am a graduate of the University of North Dakota and the College of Medical Evangelists.

Q. In what year?

A. In 1920. I have been professor of pharmacology and therapeutics for the past ten or twelve years in this school.

Q. What school?

A. College of Medical Evangelists.

Mr. Tolin: We are having trouble hearing him.

By Mr. Lyon:

Q. A little louder, please, doctor.

A. I am a member of the group of consultants for the Council of Physical Therapy of the American Medical Association. I have charge of the therapy department of the White Memorial Hospital, Los Angeles, and I am vice-president of the American Congress of Physical Therapists, and I am a member of the examining board of physical therapy technicians for the American Register of Physical Therapy Technicians. That is all, I think.

Q. Your specialty has been, I take it, in the fields of pharmacology and therapeutics and physical therapy? A. Yes, sir.

Q. You have specialized in those fields for a number of years?

A. Yes, sir. I have been at it for about 20 years. [166]

Q. What has been your general medical practice, in addition to those specialties?

(Testimony of Dr. Fred B. Moor.)

A. Well, it has been teaching and some internal medicine.

Q. Teaching where?

A. In the College of Medical Evangelists, pharmacology and therapeutics.

Q. In Los Angeles?

A. In Los Angeles and Loma Linda, California.

Q. How long have you been teaching those subjects? A. Since 1921.

Q. Doctor, will you tell us how ultra-violet rays are measured?

A. Well, ultra-violet rays are measured commonly by the use of a photometer, which is a photoelectric—contains a photoelectric quartz cell, which is excited by and which is measured by a galvanometer, which is the common way of measuring it.

Q. What is the unit of measuring ultra-violet rays? A. Well, you mean the wave length?

Q. Yes.

A. That is either a millimicron or an angstrom unit.

Q. That is, those are synonymous?

A. No. One millimicron is ten times the angstrom unit.

Q. And what is the angstrom unit?

A. The angstrom unit,—you mean in relation to the inch [167] or—

Q. Yes. In relation to the millimicron?

A. The angstrom unit is one-tenth of the millimicron.

(Testimony of Dr. Fred B. Moor.)

Q. And that is a common method of measurement of ultra-violet rays, is it? A. Yes, sir.

Q. Are ultra-violet rays emitted from natural sunlight? A. Yes, sir.

Q. What would be the wave lengths of such ultra-violet rays of the sun?

A. Well, the wave lengths of the sun's ultra-violet ranges from the limit of the ultra-violet and the visible spectrum, which is about 3900 angstroms, down to 2910, in the ultra-violet.

Q. What is the spectral range of natural sunlight?

A. The spectral range is from 2910 in the ultra-violet to around 50,000 angstroms in the infra-red, that is, through the visible spectrum into the infra-red.

Q. And the limit of the ultra-violet is about 3900?

A. That is the boundary between ultra-violet and the visible spectrum, yes.

Q. And most of the ultra-violet rays would be between what ranges of angstrom units, would you say? A. 2910 and 3900.

Q. What is a lamp which emits ultra-violet rays of that [168] spectral range commonly known as in the medical profession?

A. It is designated as a sun lamp.

Q. Is there any other commonly designated type of lamp, other than a sun lamp?

A. Well, there is a so-called therapeutic lamp.

Q. In regard to other wave lengths?

(Testimony of Dr. Fred B. Moor.)

A. The therapeutic lamps, yes.

Q. What are therapeutic lamps?

A. Those are artificial sources of radiation, in which you may produce shorter ultra-violet radiation than the sun lamp, although they may contain that same radiation as the sun lamp, too, in the spectrum.

Q. What would the ultra-violet rays of the therapeutic lamps consist of? What spectral range?

A. They go into the limit of quartz transmission, which is 1860 angstroms. That is the shortest radiation that quartz will transmit.

Q. It has been testified in this case, Doctor, that the product of the respondent in question in this case, known as the Life Lite lamp, is as follows:

Wave lengths of 2540 angstrom units, 89.2 per cent; wave lengths of 2960 to 3020 angstrom units, .6 per cent; wave lengths of 3132 angstrom units, 1.8 per cent; wave lengths of 3660 angstrom units, 1.5 per cent; visible light and heat, 6.9 per cent; total 100 per cent. [169]

How would you classify such a range?

A. That would be classified as a therapeutic lamp.

Q. What are the distinctions between a sun lamp and a therapeutic lamp, so far as their uses are concerned?

A. Well, the sun lamp is a lamp which is ordinarily used for biological effects, that is, a lamp which will produce or stimulate physiological

(Testimony of Dr. Fred B. Moor.)

changes, for instance, the activation of dehydro-cholesterol of the skin.

The therapeutic lamp contains shorter rays which may be used for bactericidal purposes, for skin stimulation, and things like that.

Q. Would you say that there was any distinction between the lamps, so far as their suitability for use without the supervision of a physician is concerned? A. Oh, yes.

Q. What is that difference?

A. Well, the sun lamp is a safe lamp, because it doesn't contain the markedly irritating rays of the therapeutic lamps. The sun lamp, of course, will start producing sunburn if it is used for a long enough period of time.

Q. What would you say would be the minimum perceptible erythema time for the use of a sun lamp? A. About 15 minutes.

Q. And with a therapeutic lamp, it would be how much?

A. It varies somewhat, of course, with distance, but we [170] figure a therapeutic lamp about 30 inches for one minute should produce a mild first degree erythema, depending on the lamp, of course.

Q. Now, it has been testified in this case, Doctor, and I call to your attention that the respondent's product consists generally of two types of lamps, one, a hand lamp designed for use in a constantly moving position over the body at a distance of not more than one inch, and the other consists of a certain lamp designed and maintained for use at

(Testimony of Dr. Fred B. Moor.)

a distance of not more than 20 to 24 inches away from the body, and having in mind the spectral range of the lamp that I have just described to you, what would you say would be the minimum perceptible erythema time for those two types of lamps, as so used?

A. Well, I don't know this particular lamp, as to its power, but cold quartz lamps with which I am familiar would produce an erythema in approximately a minute.

Q. At what distance do you mean?

A. About 20 inches.

Q. How about the distance of one inch?

A. Well, that would be a matter of a few seconds; probably five or ten seconds.

Q. Now, it has been testified by the president of the respondent company that such a lamp would produce a minimum perceptible erythema within ten to twelve seconds. Would [171] you say that was approximately right?

A. That would be approximately right, I should think.

Q. Now, what are the principal radiations in the electromagnetic spectrum, so far as classification into rays are concerned?

A. Well, we are speaking entirely of the spectrum of lamps. The electromagnetic spectrum would contain ultra-violet visible and infra-red radiation.

Q. What would be the spectral range of those various types of rays?

(Testimony of Dr. Fred B. Moor.)

A. Well, from a therapeutic standpoint the shortest ray we can get from the transmission of quartz is 1860 angstrom units. From there to 3900 is the whole ultra-violet spectrum that we have available. Then the visible spectrum extends from 3900 to approximately 7800 angstroms, where it contains the visible rays; the red, orange, yellow, green, blue, indigo, and violet. And then from 7800 we have on to, well, depending on the generator, probably up to 150,000 angstroms, we have the infra-red spectrum. The limit of the sun, of course, is about 50,000.

Q. What are the chief sources of ultra-violet radiation, both natural and artificial?

A. Well, the chief natural source, of course, is sunlight.

The artificial sources are the various lamps, the carbon arc, the mercury arc, various cathodic arcs. Of [172] course, this cold quartz lamp is really a mercury arc.

Q. Now, it has been testified in this case and admitted by the respondent company that the lamp in issue in this case is a cold quartz lamp, consisting of a mercury arc burned in quartz. Are you familiar with those lamps? A. Yes, sir.

Q. They are a common type of therapeutic lamps? A. Yes, sir.

Mr. Tolin: Just a moment, please, counsel. I will object to the question upon the ground that the testimony is not that it is a mercury arc. It is a mercury vapor discharge tube.

(Testimony of Dr. Fred B. Moor.)

By Mr. Lyon:

Q. I will stand corrected on that point, Doctor.

A. That is right.

Q. And your answer is? A. That is right.

Q. You may consider the question as it was amended by counsel for the respondent. Now, are you familiar with that type of lamp?

A. Yes, sir.

Q. What has been the nature and extent of your experience with such a lamp?

A. Well, we use one in our physical therapy department. We have had it in there for probably four or five years. [173]

Q. Would you say that the spectral range of such a lamp would be as I have previously mentioned to you? A. Yes, sir.

Q. Are all cold quartz lamps of that approximate spectral range? A. Yes, sir.

Q. Are any of those rays found in the sun's rays, to any extent?

A. Not in itself. Most of the radiation in this lamp is shorter than sunlight and not found in sunlight as it reaches the earth.

Q. What is the difference in the effect from the shorter waves found in the cold quartz lamps as compared to the effect of the rays of natural sunlight?

A. Well, the shorter rays are much more irritating to the skin. They are bactericidal, more bactericidal than sunlight. They do not have the same biological effects as sunlight.

(Testimony of Dr. Fred B. Moor.)

Q. Now, in what conditions would you say that such rays, such ultra-violet rays, of 2540 angstrom units, such as are found primarily in this respondent's product, would be useful in the treatment of disease or body ailments?

A. Useful chiefly for very superficial infections and if it is desirable to produce irritation of the skin, it can be used for that also.

Q. That is, you would say that it would have a bactericidal [174] and stimulating——

A. And stimulating effect on the skin, yes.

Q. That would be two different classifications of effect; is that correct? A. Yes.

Q. And you say the bactericidal effect would be superficial? A. Yes, sir.

Q. Just what do you mean by that?

A. Well, I mean that these rays have very little penetrating power into the surface. A very thin opaque medium of any kind will shut them out. In fact, the medium does not always have to be opaque. It may be opaque to the rays and yet be transparent to the visible rays.

Q. And what bacteria would be affected by such a lamp?

A. Well, practically any organism which is on the surface. There are a few bacteria which flourish in light, but most of the pathogenic organisms are killed by light if they are right on the surface, where they are not protected by any covering of pus or crusts on the surface.

(Testimony of Dr. Fred B. Moor.)

Q. What is the reason for the use of quartz in such a lamp?

A. Well, quartz must be used in order to allow the passage of radiation from the tube to the surface or to the outside. There are glasses, of course, which transmit. For instance, certain types of Korax glass will transmit radiation, but not as well as quartz. [175]

Q. Would there be any other possible damage caused by the use of such a lamp?

A. Well, certain diseases, for instance, pulmonary tuberculosis, ultra-violet radiation may produce actual damage by causing extension of the process, rises in temperature, and so forth.

Q. You mean by that, activate the disease?

A. Yes, activate the disease.

Q. Are there any other physical conditions or elements of [178] the body which would be injured or increased by the use of such a lamp?

A. Well, certain skin diseases may be made worse. For instance, certain eczemas, lupus erythematosus, and then some systemic diseases, like diabetes, are usually considered contra-indicated. Debilitation of seriously ill patients or elderly people, a severe kidney disease, advanced cardiac disease, are some of the contra-indications of its use.

Q. This would be true in regard to ultra-violet rays in general, would it? A. Yes, sir.

Q. That is, ultra-violet rays would be contra-

(Testimony of Dr. Fred B. Moor.)

indicated in all of the conditions you have mentioned? A. Yes, sir.

Q. That includes the ultra-violet rays emitted by respondent's products, which I have described to you? A. Yes, sir.

Q. Would it be possible for skin conditions where there is a quiescent local infection to be changed into an acute active change, with the use of such a lamp?

A. That is a possibility, yes, sir.

Q. Would persons with an unusual sensitivity be injured in some cases? A. Yes, sir.

Q. Are there any other forms of tuberculosis, in addition [179] to pulmonary tuberculosis, which would be aggravated by such rays?

A. Well, ultra-violet radiation in the form of sunlight is commonly used for extra pulmonary tuberculosis. I don't think that the others would be activated particularly from ultra-violet radiation.

Q. Would there be any forms of dermatitis which would be aggravated by ultra-violet?

A. Those that I named, especially eczema, psoriasis, possibly sometimes.

Q. Would you say that the use of respondent's device would be of any value in the treatment of chronic infections, Doctor? A. Not directly.

Q. Now, will you simplify that?

A. Well, if you mean building up resistance to an infection, that is not an accepted action of ultra-violet radiation. [180]

(Testimony of Dr. Fred B. Moor.)

Q. What would you say with respect to bronchitis? A. No direct effect on bronchitis.

Q. What is the cause of bronchitis?

A. Bronchitis is commonly caused by germs in the respiratory tract. It may be also caused by chemical irritation, but most commonly by infection.

Q. Why would ultra-violet rays not reach the source of that infection?

A. Because they don't penetrate, they are very superficial in action.

Q. It would have to be below the surface of the skin in [181] order to reach bronchitis?

A. Yes, sir.

Q. And you say ultra-violet rays, such as are emitted by respondent's product, do not reach below the surface of the skin? A. No, sir.

Q. Is that correct? A. Yes, sir.

Q. Would the use of respondent's device be of any benefit or value in the treatment of colds?

A. No.

Q. And why not?

A. Well, here again we do not believe that—at least, it is not accepted at the present time, that ultra-violet radiation builds up resistance to infections.

Q. What are the causes of colds? Are they known?

A. Well, the cause of colds is not known, but it is thought to be a filtrable virus which is not like the ordinary bacteria.

(Testimony of Dr. Fred B. Moor.)

Q. Is there any commonly accepted medical treatment for colds?

A. Nothing that is very effective.

Q. Does the medical profession recognize the use of such an ultra-violet lamp as respondent's product in the treatment of colds? [182]

A. No, sir. [183]

Q. I will name a number of skin diseases, Doctor, and ask you if this has any value in the treatment of such diseases. [184]

Q. Ringworm?

A. I doubt if it would be of value in ringworm, although I wouldn't want to be too sure of that.

Q. Athlete's foot? A. No value.

Q. And why not?

A. Because the organism which produces the fungus which produces athlete's foot burrows down into the skin and the tendency of the organism would be to go deep.

Q. What is the accepted medical treatment for athlete's foot?

A. Various ointments. One is the so-called Whitfield's ointment, acetoacetic acid. That is Whitfield's. Another is phenolmercuo nitrate.

Q. Doctor, it has been testified in this case by the president of the respondent that he cured himself, without any medical advice or supervision, of a case of athlete's foot by the use of ultra-violet rays of his product involved [185] in this case. Would you say that would be possible?

(Testimony of Dr. Fred B. Moor.)

Trial Examiner Reardon: Just a moment. Off the record, please.

(There was a discussion off the record.)

Trial Examiner Reardon: On the record.

By Mr. Lyon:

Q. I will modify that question, Doctor, and assuming that he has testified that he had such a condition of athlete's foot and used the ultra-violet lamp for a considerable length of time, with no other treatment, and the condition disappeared. Would you say that that would be due to the results or influence of the ultra-violet rays of such a lamp?

A. Assuming that the diagnosis was correct, I would have to admit it was caused by the lamp.

Q. Would athlete's foot disappear without any medical treatment, or treatment of any kind?

A. Not usually.

Q. Assuming that no other treatment is used, would you say that the ultra-violet rays in that case would have had some effect?

A. Likely so.

Q. In your opinion, in most cases it would have no effect; is that true?

A. I think so.

Q. Would it be possible for anybody to have a superficial [186] case of athlete's foot, where the organism had not burrowed into the skin?

A. Well, the nature of the organism is such that I think it usually burrows into the skin. I am not a dermatologist. I don't know about the microscopic pathology concerned here, but I know that this organism does burrow into the skin.

(Testimony of Dr. Fred B. Moor.)

Q. Ordinarily, the ultra-violet rays will not penetrate that far? A. That is right.

Q. What would you say in regard to acne, Doctor? A. Of little value in acne.

Q. What value would it have?

A. Well, it may produce some slight temporary improvement, but not permanent.

Q. What would the temporary improvement be?

A. The lessening of the number of pustules.

Q. What is the generally accepted medical treatment for acne?

A. Well, the best recognized treatment is x-ray therapy.

Q. How about eczema?

Mr. Tolin: Objected to as asked and answered.

By Mr. Lyon:

Q. How about eczema, as regards the treatment of such a condition by respondent's device?

Mr. Tolin: Objected to as asked and answered.

Trial Examiner Reardon: On what ground, please? [187]

Mr. Tolin: As asked and answered. He has already gone into that.

Mr. Lyon: I don't think he has. I don't believe I asked him that question.

Trial Examiner Reardon: Have you answered that before, Doctor?

The Witness: It seems to me I answered a question on eczema. I am not certain.

Trial Examiner Reardon: I will overrule the objection. It may be repetition.

(Testimony of Dr. Fred B. Moor.)

Mr. Lyon: It will not do any harm anyway.

The Witness: Not usually considered of any value in eczema.

By Mr. Lyon:

Q. Psoriasis?

A. You are speaking of this particular lamp now?

Q. Yes, that is right, I am talking of the respondent's product.

A. I would say it is of no value.

Q. Of no value? A. Of no value. [188]

Q. Would respondent's device be of any value in the treatment of sores or ulcers?

A. It might.

Q. In what way?

A. As a stimulating effect to hasten healing.

Q. Would it heal them, in your opinion?

A. Not by itself.

Q. You make a distinction between sores and ulcers, from a medical standpoint?

A. Well, the distinction I would make is that in chronic ulcers I would specify that this probably would be the only [189] indication for such a use, because you need stimulation to hasten healing.

Q. Would you say that use of such a device would stimulate the tissues in the skin?

A. These short rays are likely to be damaging to the human tissues and, therefore, this lamp would not be desirable for most open wounds; only, I would say, the very chronic ones. The longer ultra-

(Testimony of Dr. Fred B. Moor.)

violet rays, such as are contained in sunlight, would be better for this purpose.

Q. What is the stimulating effect, if any, of ultra-violet rays, such as are found in the cold quartz lamps? Just how far would that effect go?

A. Well, it would change a chronic inflammation into a more acute one, and thereby probably promote healing somewhat.

Q. Would it have any tendency to build up resistance in the body against disease? A. No.

Q. And why not?

A. Well, resistance against disease means a stimulation of antibody formation; for instance, white blood cells and various chemical antibodies, and ultra-violet radiation has not been shown to have that effect on white blood cells.

Q. Would the use of such a device produce a chemical reaction in the body, in your opinion?

A. Only in the activation of ergosterol in the skin. [190]

Q. And just what is that?

A. It really isn't ergosterol that is activated. It is a cholesterol derivative which is activated by ultra-violet rays, chiefly those, however, in the longer range for the production of vitamin D, and vitamin D influences the absorption of calcium and phosphorous from the gastro-intestinal tract and its deposition in bone, especially in children.

Q. Are you familiar with a book written by Dr. Richard Kovacs on the subject of Ultra-Violet Radiation and Therapy? A. Yes, sir.

(Testimony of Dr. Fred B. Moor.)

Q. Would you agree with his statement that the——

Mr. Tolin: I will object to that as hearsay.

Trial Examiner Reardon: You have read that, I suppose, and you may ask any question that occurs to your mind,——

Mr. Lyon: All right.

Trial Examiner Reardon: ——without stating what your question is based on.

By Mr. Lyon:

Q. In your opinion, would you agree that the only definite benefits known to come from the use of ultra-violet rays would be the maintaining of the phosphorous and calcium of the body and inhibition of rickets?

A. Really, that is the only well proven effect of ultra- [191] violet radiation of the body.

Q. In your opinion, would that be the only proven benefit from such a device,——

A. Yes.

Q. ——of the respondent, as described to you in this case? A. Yes, sir.

Q. Would you say that such a device would keep the blood stream in balance?

A. I would say no, because that is a rather vague statement, keeping the blood stream in balance.

Q. It is not a medical term? A. No, sir.

Q. Would you say that it would aid in overcoming a deficiency of the white or red corpuseles?

A. No.

(Testimony of Dr. Fred B. Moor.)

Q. Would it produce a tonic effect on the blood?
[192]

A. No.

Q. Would it have any effect at all upon the blood?
A. No.

Q. Would it stimulate the endocrine glands?

A. No, not so far as we know.

Q. What are the endocrine glands?

A. The glands of internal secretions, such as the thyroid, the pituitary, the adrenals.

Q. Would it quiet the nerves or the nerve endings in the skin?
A. No.

Q. Would it act as an antacid or have an alkalizing effect upon the body?
A. No.

Q. Would the use of such a device result in the improvement of the person's own metabolism?

Trial Examiner Reardon: What do you mean by "such a device"?

Mr. Lyon: As respondent's product. I am talking about respondent's product in all these questions.

The Witness: Well, we speak of the handling of phosphorous and calcium as metabolism. Are you speaking of metabolism of the carbohydrates? If that is the question, I would say no.

By Mr. Lyon:

Q. What is metabolism? [193]

A. Metabolism applies to the general chemical processes of the body, such as the absorption—not the absorption, but the handling, the burning of

(Testimony of Dr. Fred B. Moor.)

carbohydrates and fats, the handling of calcium and phosphorous. Most of the chemical processes of the body are sometimes spoken of as metabolism; for instance, the absorption and assimilation and elimination of nitrogenous food, spoken of as nitrogenous metabolism.

Q. Would you say that the use of respondent's device would have any regulatory influence on the metabolism in cases showing a calcium and phosphorous deficiency? A. Some, not much.

Q. Would it normalize the body chemistry?

A. No. In so far as calcium and phosphorous metabolism is concerned, that would be the only effect.

Q. What was that again, please?

A. Only in so far as calcium and phosphorous metabolism is concerned.

Q. What would be the effect in those cases? [194]

A. It would hasten the absorption and deposition of calcium and phosphorous in bone. [195]

Cross Examination

By Mr. Tolin:

Q. Doctor, isn't it the general philosophy of the medical profession that people should not undertake any health measures, other than the ordinary activities of eating and sleeping, except on the advice of a physician? [198]

A. I don't know just what you mean by "health measures."

Q. I mean by "health measures" the use of any-

(Testimony of Dr. Fred B. Moor.)

thing, either a physical force of some kind, or a chemical or foodstuff other than that which people will eat at the ordinary dinner table, or the sleep that they will have when they have ordinary repose.

Mr. Lyon: Just a minute. If the Examiner please, I object to the question as being entirely too general. I think that it should be limited to a device such as in issue in this case.

Trial Examiner Reardon: No, I will overrule the objection. You may answer.

The Witness: I think that is true. Physicians are interested in protection of the public, and most of these things, outside of eating and sleeping, are something which may have some potential danger in them.

By Mr. Tolin:

Q. I, for instance, might be suffering from diabetes and not know it, and be injuring myself by the diet which is acceptable to a normal individual, but injurious to one in that condition; isn't that true? A. I think that is true.

Q. So that even in the every day activities, you think we really need to do that with some guidance from the medical profession, don't you? [199]

A. We would be better off if we did have some guidance; most of us.

Q. Now, do you use a quartz lamp in your practice? A. Yes, sir.

Q. How long have you used it?

A. About 18 years.

(Testimony of Dr. Fred B. Moor.)

Q. The quartz lamp and the device sold by the respondent here are the same thing, aren't they?

A. Not the quartz lamp I have used.

Q. Well, wherein does the quartz lamp that you used differ? A. We use the hot quartz lamp.

Q. Oh, haven't you ever used cold quartz?

A. We have a cold quartz lamp which we use occasionally, but most of our work is done with hot quartz.

Q. In what way have you used cold quartz?

A. We have used it mostly for the treatment of certain skin conditions. That is practically all we have used it for at any time.

Q. What skin conditions have you used it for?

A. We have used it for pityriasis rosea and impetigo. I think those are the only things we have used it for.

Q. Have you obtained good results with it, in the use for those particular disorders?

A. In pityriasis, yes; in impetigo, I would say no.

Q. You know, however, that the medical profession generally [200] does consider it useful in the treatment of impetigo?

A. Not generally accepted.

Q. You have used that term, "not generally accepted," before in your testimony here. Can you tell me what you mean by that?

A. Well, I base that on the opinion of the Council of Physical Therapy of the American Medical Association. They have issued various

(Testimony of Dr. Fred B. Moor.)

statements on such equipment, and that is what I base that on. If they accept it, I assume it is generally accepted.

Q. Where may those statements be found?

A. They issue statements at various times in the Journal of the American Medical Association, and in the section by the Council of Physical Therapy.

Q. Are they issued in any other publication, that you know of?

A. They get out a pamphlet or a book, I just can't recall the name of it at the moment, but those things are published in a book and issued by the Association.

Q. Is that the Archives of Physical Therapy?

A. No, the Archives of Physical Therapy is the Journal of the American Congress of Physical Therapy.

Q. Is that an organization of which you are an officer?

A. Yes, sir.

Q. Are the statements, the articles, in the Archives of [201] Physical Therapy accepted as authoritative, with respect to this type of thing, that is, ultra-violet light of one kind and another?

Mr. Lyon: Accepted by whom? I think that should be specified.

Mr. Tolin: Accepted by the medical profession.

Trial Examiner Reardon: Off the record.

(There was a discussion off the record.)

Trial Examiner Reardon: On the record. Repeat the question, please.

(The question was read by the reporter.)

(Testimony of Dr. Fred B. Moor.)

The Witness: The originator of the statement would have to be considered in that case. Some men bear more weight than others.

By Mr. Tolin:

Q. The Archives of Physical Therapy, however, do not contain articles by men who have no standing at all in the field of physical therapy, do they?

A. That is right.

Q. So that, in order to have an article published in that publication, one would have to be recognized as a legitimate practitioner of medicine?

A. That is right.

Q. And for the most part, in order to have an article accepted in that publication, one would have to be recognized [202] as having some specialized experience or training in the field of physical therapy?

A. Yes.

Q. Now, generally speaking, the Council of Physical Therapy, in its publication, where it issues a statement upon a subject, will base that statement only upon an experience, which to the mind of the majority of the Council conclusively establishes that the particular device or product does accomplish a particular result beyond all question?

A. That is right.

Q. So that, in order to obtain a favorable statement for a particular device or treatment, in a statement of the Council of Physical Therapy, it is necessary for that product or thing that is brought to their attention to have had an established experience of success, is it not?

A. That is right.

(Testimony of Dr. Fred B. Moor.)

Q. Hence it is true, isn't it, that many devices have been used successfully for a considerable period of time prior to their being favorably reported upon in a statement of the Council of Physical Therapy?

A. Yes, that is true. Of course, in many instances they have never been submitted to the Council. For example, apparatus, if accepted by the Council, is submitted to the Council and they study it and approve it, if it seems to be of value. [203]

Q. Well, aren't your statements here in evidence, your conclusions as to the matter that you testified to, based upon the statements of the Council of Physical Therapy? A. Some of them are.

Q. What were the others based on?

A. My own personal experience and observation.

Q. Now, just what personal experience and observation have you had with a cold quartz lamp, in its use upon the human body?

A. I have had it in my department for several years and have used it occasionally.

Q. Have you used it upon any person for treatment of diseases other than the two that you mentioned in a previous answer?

A. No, I don't think I have.

Q. Now, you have mentioned quartz lamps as emitting rays of angstrom units as low as 1860. It is true, however, isn't it, that the angstrom units emitted from such lamps may go up as high as 2900? A. Yes, sir.

(Testimony of Dr. Fred B. Moor.)

Q. You did not intend to state that 1860 was an inflexible angstrom unit limit of those rays?

A. It is the inflexible limit of quartz by transmission. Quartz will not transmit any radiation shorter than 1860.

Q. But it does transmit radiation up to 2900?

[204]

A. Oh, yes.

Q. When the respondent here claims that his product transmits radiation of 2537 angstrom units, that is entirely within the probabilities, isn't it?

A. Of quartz transmission?

Q. Yes. A. Yes, sir.

Trial Examiner Reardon: Is the answer "yes"?

The Witness: Yes.

Mr. Lyon: If the Examiner please, the evidence shows 2540 instead of 2537, I believe.

Mr. Warren: There is no technical difference.

Trial Examiner Reardon: Off the record.

(There was a discussion off the record.)

By Mr. Tolin:

Q. May we consider that that question referred to 2540 instead of 2537? A. Yes, sir.

Q. Would your answer be the same?

A. Yes, sir.

Q. Does the sun lamp ordinarily have a beneficial effect upon the human body?

A. If it is used according to proper indications, yes.

Q. The only practical difference in its effect

(Testimony of Dr. Fred B. Moor.)

upon the body lies in the fact that it takes longer to obtain a result [205] from the sun lamp than it does to obtain the same result from a therapeutic lamp, isn't that true?

A. Except that the therapeutic lamps have shorter radiation, as a general thing, than the sun lamps.

Q. With that exception, the answer would be "yes", would it not?

A. May I hear that question again?

(The question referred to was read.)

A. No, I would say that isn't true, because the therapeutic lamp has shorter radiation. It is more irritating than the sun lamp and it doesn't have the pronounced biological effects that the sun lamp has.

Q. What pronounced biological effect is obtained with the sun lamp that is not obtained with a therapeutic lamp?

A. The activation of vitamin D from cholesterol in the skin.

Q. Does not the therapeutic lamp have that effect?

A. Not the cold quartz lamp. It has the effect, but not nearly as great as the longer wave lengths contained in sun lamps.

Q. There is an appreciable activation of vitamin D in the human body by the use of cold quartz, is there not?

A. That is true.

Q. And the practical effect of that is that the calcium metabolism of the body is improved?

(Testimony of Dr. Fred B. Moor.)

A. That is right. [206]

Q. Now, just what does calcium metabolism involve?

A. It involves the deposition of calcium in the bone structure, and, also, the calcium is present, of course, in all tissues of the body.

Q. What percentage of the calcium of the body is present in the bone structure?

A. Well, I can't give you the figure offhand. It is a high percentage.

Q. But there is a definite percentage present in the blood and lymph of the body as well?

A. That is right, yes, sir.

Q. What is the function of that calcium that is present in the blood and lymph?

A. The calcium in the blood is necessary for blood coagulation, necessary for contraction of muscle. It is necessary for sedation of the nervous system. That is, the nervous system causes you to be very irritable in the absence of calcium.

Q. So a calcium deficiency in the blood gives rise to various nervous and muscular diseases, does it not?

A. That is right.

Q. It gives rise also to heart disease, does it not?

A. Well, if the deficiency were severe enough, it might, but that is not a common cause of calcium deficiency—a common cause of heart disease, I should say. [207]

Q. Calcium deficiency diseases are among the serious diseases with which the human race is afflicted, however?

A. Yes, sir.

(Testimony of Dr. Fred B. Moor.)

Q. In your opinion, is calcium deficiency of the blood corrected to any extent at all by the use of cold quartz light?

A. It must be because it benefits rickets.

Q. Rickets is a calcium deficiency disease, is it not?

A. True.

Q. And from a condition of rickets many other diseases result, is that true?

A. No, not directly.

Q. But they co-exist, that is, the same condition that has brought about rickets will bring about numerous other diseases in the same person?

A. I wouldn't accede to that statement. I don't believe that is so.

Q. Well, is any statement approximately like that true? If so, will you make such a statement?

A. It is true that rickets occurs in debilitated children; that is, children are debilitated with rickets, and that might predispose them to other diseases, that is true.

Q. Rickets is caused by a deficiency of calcium or some defect in calcium metabolism, is it not?

A. Not caused by a deficiency of calcium alone. It is [208] caused by a deficiency of vitamin D.

Q. Then the use of a cold quartz light frequently would tend to activate in the body vitamin D to the end that the person so using the light would be less apt to have calcium deficiency, would it not?

A. Correct.

Q. And if we avoid calcium deficiency, we are

(Testimony of Dr. Fred B. Moor.)

exerting a general prophylaxis in our body, are we not? A. To a certain extent. [209]

Q. Now, what are the two diseases in which you have used cold quartz light in your own practice? A. Pityriasis rosea and impetigo.

Q. Those are the only ones? [211]

A. Yes, sir.

Q. Now, doctor, is it true that cold quartz light, emanating from a light such as you have examined here in the hearing room,—

Trial Examiner Reardon: You mean the respondent's?

By Mr. Tolin:

Q. —the respondent's light, does reach the blood stream?

Mr. Lyon: Just a minute. I will object to that question as referring to something not in evidence.

Trial Examiner Reardon: Overruled. He may answer.

The Witness: I can't say. It is very superficial in action, but whether its penetration would be enough into the skin to reach the blood stream, I do not know.

By Mr. Tolin:

Q. Vitamin D is manufactured in the skin, is it? A. Yes, sir.

Q. The skin consists of several layers?

A. That is right.

Q. I don't know if that is a correct medical term,

(Testimony of Dr. Fred B. Moor.)

but that is the way I understand, it does consist of several layers, does it not? A. Yes, sir.

Q. What is the first one, as we go in?

A. The epidermis.

Q. What happens in the epidermis when ultra-violet light, [212] emanating from cold quartz, strikes it?

A. Well, vitamin D is manufactured somewhere in that superficial layer of the skin. It is manufactured even, apparently, in feathers of birds, so that it does not necessarily mean that the radiation strikes the blood stream.

Q. Is the epidermis itself made up of several layers?

A. Yes, there is more than one layer of epidermis.

Q. What are they?

A. Well, there is a very superficial layer of dead cells, and then there is another—probably another layer below that. I don't remember all the layers of the skin myself. There is another layer. Then you come to the true skin or dermis below that, in which the blood supply is abundant.

Q. In which the blood supply that fills the skin and nourishes it is found; is that right?

A. Correct.

Q. And is it the blood that comes into that part of the skin that receives ultra-violet light from a cold quartz light?

A. I don't know whether your radiation penetration would be enough to reach the blood in the

(Testimony of Dr. Fred B. Moor.)

deeper layer of the skin or not. I am under the impression that it does not.

Q. Well, is it your testimony now, Doctor, that you do not know how far into the skin cold quartz emissions of 2540 or 2537 angstrom units will penetrate? [213]

A. I know it is very superficial, but I can't state in millimeters. It is probably less than one millimeter, the penetration.

Q. How thick is the skin?

A. Oh, the skin, the whole skin, probably three or four or five millimeters thick.

Q. Do you know, without just hazarding a guess, but do you know from your study or observation whether cold quartz light does in some instances penetrate the skin and reach the body tissue below the skin?

A. I have not done the experiments myself. It was done at the University of Chicago by Dr. Bachem.

Q. Dr. Albert Bachem? A. That is right.

Q. Of the University of Illinois?

A. The University of Illinois, that is right.

Q. Do you consider statements by Dr. Albert Bachem upon the subject of cold quartz light as authoritative? A. Yes, they should be.

Q. Do you know what Dr. Albert Bachem says respecting the depth at which ultra-violet light emanating from cold quartz of 2537 angstrom units has penetrated the skin of a white human being?

A. I don't remember his exact figure.

(Testimony of Dr. Fred B. Moor.)

Q. You don't know from any other source,——
[214]

A. No, sir.

Q. ——to what depths——

A. Not the exact depth.

Q. ——that a light of that kind penetrates?

A. Not the exact depth.

Q. You are not prepared to say that it does not go all the way through the skin, are you?

A. Why, certainly, I am. I judge from data contained in medical literature. I don't do everything, of course, myself, that you ask here.

Q. Please understand, Doctor, I am not asking you that your whole answer should be based on what you have done. Would you state that a statement of this kind is true:

“From the various physical and biological effects observed we can state that the wave length, 2537 angstrom units, has enough penetrating power to produce biologic effects; that it causes an erythema with little danger of over-exposure and accumulation; that it has a positive antirachitic effect; it produces Vitamin D and does not destroy it as long as excessive irradiation is avoided. Hence, there is not antagonistic effect between this and the longer actinic rays.”

Would you say that that statement is true?

A. Yes, sir. [215]

Q. “In regard to the bactericidal effect it does

(Testimony of Dr. Fred B. Moor.)

not differ from rays of longer or shorter wave length."

By "it" meaning that 2537 angstrom units of ultra-violet light transmitted through cold quartz. Would you say that statement is correct?

A. I would say that is correct.

Q. Do you recognize it as quotations from the writings of Dr. Albert Bachem in the Archives of Physical Therapy?

A. Well, I don't remember the statement. I suppose I have read it, but I don't remember it.

Q. Well, do you know that Dr. Bachem has given an opinion of that kind, or to that effect?

Mr. Lyon: I object to that. The witness has already answered the question.

Trial Examiner Reardon: I overrule the objection. You may answer.

The Witness: Well, I don't remember that statement of Dr. Bachem?

By Mr. Tolin:

Q. Do you know whether that statement is in keeping with the general course of instruction of Dr. Bachem? A. I think it is.

Q. Would you say that this statement is correct:

"The valuable action of ultraviolet irradiation in skin diseases is due to many effects. Among the [216] general effects are:

"(a) stimulation of cellular metabolism;
(b) increased resistance of the body to infec-

(Testimony of Dr. Fred B. Moor.)

tion; (c) stimulation of the vasomotor reflexes of the body; (d) improvement in the functional activity of the skin in consequence of a redistribution of blood amongst the organs of the body; (e) production in the skin of Vitamin D which hastens the healing of certain skin conditions; (f) alteration in blood chemistry—calcium, potassium, etc.—the rays acting as a mordant for calcium; and (g) a marked psychological improvement”?

A. Of course, those are the opinions of one man, but even though Dr. Bachem—if that is from Dr. Bachem,—may be an authority, there are numerous other authorities who do not agree with him on all of those statements.

Q. But do you agree with those statements?

A. Not all of them.

Q. Well, let's go through them and let us see how far you will go along with this statement. “Stimulation of cellular metabolism;” do you agree with that?

A. Well, that is quite a general statement. I wouldn't want to agree with it and not know just what type of cellular metabolism is meant.

Q. Well, to some extent would you say that cellular [217] metabolism is influenced by the use of cold quartz?

A. No, I wouldn't even state that.

Q. Is your refusal to say that based upon the fact that you feel not sufficiently acquainted with the literature of the subject to know?

(Testimony of Dr. Fred B. Moor.)

A. No, it isn't.

Q. Is it based upon your own experimental work or your class room instruction at the time that you have been a student? A. No.

Q. Is it based upon laboratory work done by others under your supervision? A. No.

Q. Upon what is it based?

A. It is based upon the statements of the Council of Physical Therapy of the American Medical Association, who have enumerated the things for which they think cold quartz light is good, and that is one of them that we have no evidence on, that it stimulates cellular metabolism.

Q. Doctor, in Scottish law they have three forms of verdict that a jury can bring in. They can say, "guilty," "not guilty," and "not proved." Now, I say that by way of a preface to this question: Is your answer then that you cannot say that cellular metabolism is influenced by the use of cold quartz light of 2537 angstrom units based upon [218] the fact that to you it is not proved?

A. Yes, sir, that is right.

Q. And you accept the fact that the Council of Physical Therapy of the American Medical Association has so far maintained the position, not proved? A. Correct.

Q. Now, let us take (b): "Increased resistance of the body to infection." Do you agree that that is true? I mean as to all of these, of course, upon the application of 2537 angstrom units from a device such as the respondent manufactures?

(Testimony of Dr. Fred B. Moor.)

A. No, I don't agree with that. Neither is that proven.

Q. Is your disagreement upon that same basis?

A. Yes, sir.

Q. And solely upon that basis?

A. Yes, sir.

Q. "(c) Stimulation of the vasomotor reflexes of the body—there is an increased tolerance to extremes of temperature." Do you agree with that statement?

A. I agree with that statement in relation to sunlight, but not on the basis of cold quartz.

Q. With relation to ordinary sunlight or the sun lamp?

A. Sunlight or the sun lamp. Sunlight more so, however.

Q. You believe that would be true of the sun lamp? A. Yes. [219]

Q. What is the position of the Council of Physical Therapy of the American Medical Association with respect to that statement, as it relates to exposure to ultra-violet from a sun lamp, if you know?

A. Well, I don't know what the attitude of the Council is on that. That is a personal opinion of mine and based on observation of patients also. For instance,——

Q. You have used the sun lamp considerably in your practice, haven't you?

A. Well, I have used something equivalent to it, yes.

(Testimony of Dr. Fred B. Moor.)

Q. And most of your experience in ultra-violet has been with the sun lamp and hot quartz, rather than with the cold quartz?

A. That is true.

Q. In fact, so far as the use of cold quartz in general therapy, you wouldn't say that you have had any experience, would you?

A. Very little.

Q. Not sufficient upon which to base an opinion as an expert witness?

A. Not from personal experience.

Q. Well, let's take (d) in this statement: "Improvement in the functional activity of the skin in consequence of a redistribution of blood amongst the organs of the body." Do you agree with that?

[220]

A. No.

Q. Is your disagreement on the basis that it has not been proved? A. That is right.

Q. And by that you mean that it has not been proved to the extent that the Council of Physical Therapy of the American Medical Association has accepted it as proved?

A. Well, I don't know that I have ever seen a statement by the Council on that particular thing.

Q. You mean it has not been proved to you?

A. It has not been proved to me, that is right.

Q. What would prove it to you, Doctor, if it were to be proved? How would it be proved to you, in your practice or study?

A. Well, it would be evidenced by changes in

(Testimony of Dr. Fred B. Moor.)

skin circulation, increased skin temperature, probably tanning.

Q. It would be proved by your taking a cold quartz light and turning it on somebody and seeing the results, wouldn't it, or rather than on somebody, on a number of persons?

A. Study, and my knowledge of other types of ultra-violet radiation.

Q. I will proceed now to (e), and ask you if this statement is true, with respect to cold quartz light of 2537 angstrom units, emitted from a device such as respondent manufactures, that it would cause "production in the skin of Vitamin D [221] which hastens the healing of certain skin conditions"? Is that true?

A. I think that is true. No. I beg your pardon. You said "of skin conditions"?

Q. Yes, "of certain skin conditions".

A. Oh, I don't think vitamin D has anything to do with it.

Q. Would you say that vitamin D has no function whatsoever in the healing of skin conditions?

A. Not so far as is known.

Q. Vitamin D, in so far as you are aware of its function in the body, has to do with calcium and phosphorous metabolism?

A. Yes, sir.

Q. Is phosphorous metabolism different from calcium metabolism?

A. Well, they are very similar. They are reciprocal. They go along together, because calcium is deposited in the skeleton as calcium phosphate?

(Testimony of Dr. Fred B. Moor.)

Q. What about this language of "a marked psychological improvement"? Do you agree with that?

A. Oh, that is a possibility with any kind of treatment.

Q. As a matter of fact, doctors often paint the skin of patients with a brilliantly colored drug, whereas so far as the therapy is concerned, they could get the same results from a colorless one, just to bring about a psychological improvement in the patient? [222]

A. I think quacks probably do it. I don't think ethical medical men do.

Q. Do you agree with this statement as a true statement, with respect to the use of cold quartz light of 2537 angstrom units, or thereabouts, emitted from a device such as respondent manufactures:

"The sedative effect of ultraviolet irradiation on the nerve endings in the skin is very valuable in allaying the intense and distressing itching associated with many skin dermatosis"?

A. No, I wouldn't agree with that.

Q. Is your failure to agree with that based upon the position of the Council of Physical Therapy of the American Medical Association that it is not proved?

A. That it is not proved.

Q. Is that your sole disagreement with that statement?

A. Yes, sir.

Q. Will you say that this statement is true: "With respect to eczema ultraviolet irradiation is of especial value in the less acute and more chronic forms"?

(Testimony of Dr. Fred B. Moor.)

A. If it is to be used in eczema, I think that is true.

Q. Do you agree with this statement as to urticaria:

“Mild application of actinic rays usually suffice to relieve the intense itching and to clear up the condition”? [223]

A. Well, it might lessen the itching, but not clear up the condition.

Mr. Lyon: May we have a definition of that particular disease?

The Witness: Urticaria is one of the allergic diseases, related to asthma and hay fever. It is due to a protein sensitization. Some people are sensitive, for instance, to strawberries, which produces urticaria.

By Mr. Tolin:

Q. Then the use of actinic rays would be simply palliative rather than curative?

A. That is right.

Q. But they would have some palliative effect?

A. Somewhat.

Q. What is the definition of “actinic rays”?

A. Well, the word “actinic” means chemical, a chemical action.

Q. Would it refer to rays of the type that emit from——

A. Yes, sir.

Q. ——the device the respondent manufactures?

A. That is right. [224]

Q. Would you say that this statement is a true

(Testimony of Dr. Fred B. Moor.)

statement, having reference to the use of cold quartz light:

“The proof that such acceleration of oxidation and reduction reactions does take place”—

well, that is not a good statement with the word “such” in that.

I will find another statement here. Would you say that this statement could not be true concerning cases treated with cold quartz light:

“Cases of tuberculosis in children and cases of early tuberculosis in war prisoners (adults) demonstrated a definite increase in activated oxygen in the blood.”

A. I wouldn't say that could not be true.

Q. If it were true, do you think it might have been caused by the radiation with cold quartz light?

Mr. Lyon: Objected to as speculative.

Trial Examiner Reardon: Overruled.

The Witness: I don't know whether it would be or not.

By Mr. Tolin:

Q. Do you know the position of the Council of Physical Therapy of the American Medical Association on that point?

A. I don't think they would accept it. I don't know absolutely, but I doubt if they accept it.

Q. You are a member of the Council, aren't you?

A. No, I am not a member of the Council. I am a member of [227] the educational committee of the Council. I am not a member of the regular Council.

(Testimony of Dr. Fred B. Moor.)

Q. How does the publication, "The Archives of Physical Therapy, Official Journal of the American Congress of Physical Therapy" compare in standing with the physicians of this country, with the British Journal of Physical Medicine? [228]

A. I think it has better standing in this country than the British Journal of Physical Medicine.

Q. Is it in this country comparable to the physicians here with the British Journal of Medicine to the physicians there?

A. I can't say as to that.

Q. It is considered a reliable publication?

A. Yes, in the field which it covers, it is.

Q. Do you know of a physician by the name of Frank H. Krusen? A. Yes, sir.

Q. What is the standing of Frank H. Krusen, as a man familiar with ultra-violet radiation?

A. He has very good standing.

Q. Would you say that this statement is a true statement:

"Ultraviolet irradiation produces photochemical effects with activation of substances in the skin and possibly in the blood. Biologic effects, such as stimulation of metabolism, cellular activity, growth and circulation are also produced. Ultraviolet radiation in wave lengths shorter than 315 millimicrons will prevent and cure rickets. These rays, in wave lengths shorter than 315 millimicrons, will impart an antirachitic potency to fats, milk, ergosterol, 7-dehydrocholesterol, oils, and vegetables. [229]

(Testimony of Dr. Fred B. Moor.)

Such radiation causes delay or latent erythema of the skin of human beings, improves the tone, color and elasticity of the skin and presumably increases the cutaneous secretory and protective powers. Also, irradiation with ultraviolet energy will increase the active oxygen content of the l-i-p-i-d-s——”

A. Lipids.

Q. ——“lipids of the skin, thus increasing their bactericidal action”?

A. I think that is all true.

Q. Is this true:

“On general exposure to ultraviolet radiation there will be produced an increase in the number of erythrocytes, leukocytes, blood platelets and hemoglobin of the circulating blood and a decrease in the hydrogen ion concentration, coagulation time and eventually in the blood volume. A transient lowering of blood pressure is produced by exposure to ultraviolet rays”?

A. There is one controversial point in there, which hasn't been proven. That is the effect on hemoglobin and red blood cells, or erythrocytes. Otherwise, I think that it is all accepted.

Q. Is this true: “From wave lengths longer than 290 milimicrons there are presumably stimulative effects [230] on the human body.” Is that true?

A. Yes, that is true, with biological rays. You don't have any of those in your lamp though; that is, not enough of them to speak of.

(Testimony of Dr. Fred B. Moor.)

Q. Well, there are some, aren't there?

A. Very few.

Q. Is this true:

“General exposures to ultra-violet rays improve muscular tone, increase the metabolism of proteins and minerals and increase the ability of the organism to utilize more effectively materials which are present but not available”?

A. There might be some controversy about the metabolism of proteins. In fact, there is.

Q. Isn't there, however, respectable and respected medical authority to the effect that ultra-violet rays emanating from a device, such as the respondent here manufactures, will produce that?

A. He doesn't specify the wave length there, does he?

Q. I have read you statements and asked you if they were true. In some of them it does specify, as the question shows, shorter than 315 millimicrons, and in another longer than 290.

A. Of course, most of the therapeutic lamps have shorter radiation than 315 millimicrons.

Mr. Lyon: What is that in angstrom units? [231]

The Witness: Just multiply it by ten: 3150.

By Mr. Tolin:

Q. I read you one question here, Doctor, which had reference to ultra-violet radiation in wave lengths shorter than 315 millimicrons?

A. That is right.

Q. Now, you remember generally that question.

(Testimony of Dr. Fred B. Moor.)

Will you say that the biological effects that I recited in that question would be—or, that your answer to the question would be the same if I added to it, assuming that the light used was light coming from such a device as respondent here manufactures?

A. Well, I would alter my statement somewhat, if I thought the only light we had came from a device of this wave length. You said a wave length shorter than 3150, which many therapeutic lamps have, and which the longer hot quartz light has, for instance.

Q. Of course, I don't want to have your "yes" answer, which you gave me, stand if we were not having a definite understanding on it.

A. Krusen is not talking about the wave lengths of this type, particularly. He is talking about wave lengths shorter than 3150.

Q. Now, let me read you part of this statement, Doctor, and as I go along in it, you bear in mind the device that is [232] in controversy here, and stop me at a point where your answer would be other than the matter I am reading to you:

"Ultraviolet radiation produces photochemical effects with activation of substances in the skin and possibly in the blood. Biologic effects, such as stimulation of metabolism, cellular activity, growth and circulation are also produced."

A. That is where I would object. That last statement there.

Q. What part of it?

(Testimony of Dr. Fred B. Moor.)

A. Well, regarding metabolism and cellular activity.

Q. You would object to this part of that statement then: "stimulation of metabolism, cellular activity, growth and circulation are also produced"?

A. That is true.

Q. You feel that is not true?

A. At least is unproven.

Q. That is, it is unproven to the Council of Physical Therapy of the American Medical Association?

A. Yes.

Q. And that is your sole basis for non-acceptance of that statement?

A. Oh, not entirely.

Q. Well, in your own experience, are those the sole bases of your rejection? [233]

A. That and perusal of medical literature which I have read on the subject.

Q. I will now read a little further here, with the same undretsanding, that you are going to stop me when I come to a place where you disagree:

"Ultraviolet radiation in wave lengths shorter than 315 millimicrons will prevent and cure rickets. These rays, in wave lengths shorter than 315 millimicrons will impart an antirachitic potency to fats, milk, ergosterol, 7-dehydrocholesterol, oils and vegetables."

Would you say that that is true of a devise that radiates wave lengths of 2537 or 2540 angstrom units? A. That is right.

Q. I will now read on: "Such radiation causes

(Testimony of Dr. Fred B. Moor.)

delayed or latent erythema of the skin of human beings, improves the tone, color and elasticity of the skin"——

A. I would object to that for this lamp.

Q. What part of that would you object to?

A. "Improves the tone and elasticity."

Q. It says "tone, color and elasticity." Does your objection go to color too?

A. Well, color is all right. I would say elasticity and tone, as unproven.

Q. By saying "unproven", you mean unproved to the Council of Physical Therapy of the American Medical Association? [234]

A. Yes.

Q. And solely on that basis?

A. Not entirely. On basis of perusal of medical literature aside from that.

Q. You mean unproved to you?

A. Unproved to me, yes, sir.

Q. You consider that the position which you take on these matters is identical to the position taken by the Council of Physical Therapy of the American Medical Association, do you not?

A. Well, largely; not entirely.

Q. You recognize that your position on matters of what is proved in the field of ultraviolet radiation is that of an ultra-conservative physician?

Mr. Lyon: Just a minute. That is objected to as argumentative.

Mr. Tolin: I am asking him on the basis that if a man gets up and says, "I am pretty radical on this subject", that means one thing, and if the man

(Testimony of Dr. Fred B. Moor.)

is ultra-conservative, it goes to the weight to be given the testimony.

Trial Examiner Reardon: I will overrule the objection.

The Witness: You mean that I am ultra-conservative?

By Mr. Tolin:

Q. Yes, Doctor? [235] A. No.

Q. On the subject of ultra-violet radiation?

A. I don't think I am ultra-conservative.

Q. What do you classify the observers of literature on ultra-violet radiation, and men who have and hold theories respecting it,—into ultra-conservatives, conservatives,—

A. And enthusiasts.

Q. —liberals, and radicals, and enthusiasts? Now, where would you place yourself?

A. Well, I would say probably a conservative. Not ultra-conservative.

Q. I will now read another statement. I am about finished.

“Also, irradiation with ultraviolet energy will increase the active oxygen content of the lipids of the skin, thus increasing their bactericidal action.”

Do you agree with that?

A. I think that is all right.

Q. As to the respondent's product?

A. Yes.

Q. “Ultraviolet irradiation will impart an anti-

(Testimony of Dr. Fred B. Moor.)

rachitic potency to the milk of cows or pregnant or nursing mothers''?

A. That is unproved for this lamp.

Q. Is it proved as to ultra-violet radiation at all? [236] A. Yes.

Q. It has not been disproved as to this lamp, has it? A. No, sir.

Q. Have any of the things you have said are unproved been disproved, to your knowledge?

A. Not so far as I know.

Q. Is it not true that in the field of ultra-violet therapy and the use of therapeutic lamps of 2540 or 2537 angstrom units, there is great division of opinion among physicians and research men of high standing?

A. I think that is true. [237]

Redirect Examination

By Mr. Lyon:

Q. I believe you stated that you are connected with the White Memorial Clinic here in Los Angeles? A. Yes, sir.

Q. And you say you have used a cold quartz lamp in connection with that clinic?

A. Yes, sir.

Q. How many years have you had that lamp there? [238]

A. We have had it four years.

Q. And what was the reason that you did not use it for any other diseases except the two that you mentioned, impetigo and pityriasis rosea?

(Testimony of Dr. Fred B. Moor.)

A. Because I have always considered the hot quartz lamp better for our purposes.

Q. And what is the difference between a hot quartz lamp and a cold quartz lamp?

A. Well, the hot quartz lamp is a mercury vapor arc in a quart tube, which has much longer ultra-violet radiation, that is, longer than this lamp here, extended way up and through the visible spectrum. As a matter of fact, there we have potent lines and a continuous wave,—potent lines in the biological region, in which there is also radiation of the sunlight.

Q. What is the majority of the spectral range of the hot quartz light?

A. They lie between 2900 and 3900 angstroms.

Q. Those are longer rays than the cold quartz?

A. Longer rays. They also have many short rays too.

Q. Those longer rays are regarded as more therapeutic than the shorter rays; is that correct?

A. Yes.

Q. Is that the general opinion of the medical profession? A. I think so. [239]

Q. By the way, what is your position with the White Memorial Clinic?

A. I am director of physical therapy.

Q. How many patients do you have occasion to observe during the course of a year?

A. We treat twenty to twenty-five thousand patients a year.

(Testimony of Dr. Fred B. Moor.)

Q. How many physicians are there under your immediate direction and supervision?

A. We have three.

Q. How many of these patients do you have occasion personally to observe during the year?

A. I write the prescriptions for all of them. I don't always see all of them, but the prescriptions come in from other physicians, and I re-write them to fit the patient.

Q. And you used the hot quartz lamp on numerous individuals in your experience?

A. Oh, yes.

Q. How many would you say, approximately?

A. Well, I have used it for years. I could not say absolutely, but I would say probably 10,000 patients.

Q. That is during the course of your entire experience——

A. My entire experience.

Q. ——with the White Memorial Clinic?

A. Yes.

Q. How long have you been there? [240]

A. I have been at the White Memorial Clinic only since 1937.

Q. How many cases have you treated with the cold quartz lamp?

A. I can't state definitely. We treat only two conditions, as I have already mentioned to you.

Q. And those are what?

A. Pityriasis rosea and impetigo.

Q. What was your experience with respect to impetigo, with the use of the cold quartz lamp?

(Testimony of Dr. Fred B. Moor.)

A. We didn't find it so very effective in impetigo.

Q. Would you say it was of any value in that condition?

A. I would say it is of little value.

Q. How about the other disease,—pityriasis rosea?

A. It is of definite value in pityriasis rosea.

Q. In your opinion, are those the only two diseases or conditions of the human body in which the cold quartz lamp would be useful in physical therapy?

A. No. I would say it is useful also for its influence on calcium metabolism.

Q. Anything else besides those?

A. That would be about the limit.

Q. By the way, Doctor, do you know anything about the standing of Dr. Samuel Ayres of Los Angeles?

A. Samuel Ayres is one of the most prominent skin men in [241] the city; well known throughout the country, as a matter of fact.

Mr. Lyon: I see. That is all.

Trial Examiner Reardon: Doctor, I was going to ask you: Is the cold quartz lamp that you have used and your staff the same as the respondent's cold quartz lamp here?

The Witness: It is the same type of radiation, but much more potent.

Trial Examiner Reardon: Thank you.

(Testimony of Dr. Fred B. Moor.)

Recross Examination

By Mr. Tolin:

Q. It has the same angstrom units, 2540, approximately, in the majority of its rays?

A. Yes, sir.

Q. And all cold quartz lamps are approximately the same, so far as the spectral range is concerned?

A. Yes, sir.

Mr. Tolin: That is all. [242]

Trial Examiner Reardon: The Commission has rested.

Mr. Tolin: I call Dr. Truesdail.

DR. ROGER W. TRUESDAIL

was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination

The Witness: The name is Roger W. Truesdail, T-r-u-e-s-d-a-i-l.

By Mr. Tolin:

Q. Dr. Truesdail, will you state your profession?

A. Well, I am a consulting chemist and consulting nutritionist.

Q. Where did you take your training in that work?

A. Well, my graduate training was done at the University of Oregon and the University of Washington.

(Testimony of Dr. Roger W. Truesdail.)

Q. Prior to that, did you take any scientific work at all?

A. Yes. I had my Bachelor's Degree from the University of [244] Redlands in chemistry.

Q. What degree did you take at the University of Oregon? A. Master of Science.

Q. What degree did you take at the University of Washington?

A. Doctor of Philosophy and Chemistry.

Q. How long have you been engaged as a consulting chemist and consulting nutritionist?

A. Since 1931.

Q. Where have you practiced that profession?

A. Here in Los Angeles.

Q. Do you have any connection with any of the institutions of learning here?

A. Yes. Since 1935 I have been a lecturer in chemistry at the University of Southern California.

Q. Have you had any teaching connection with any of the other schools here, that is, in the Southwest?

A. Yes. I was—prior to starting my own laboratories here in Los Angeles, I was in the Department of Chemistry for four years at Pomona College, and prior to that I had been, as acting head of the department of chemistry for one year, at the University of Redlands.

Q. Have you taught in any schools outside of California?

A. Yes, the University of Nevada.

(Testimony of Dr. Roger W. Truesdail.)

Q. Have those teaching positions been in the teaching of scientific subjects? [245]

A. Yes, entirely in the field of chemistry.

Q. Are you connected with some laboratory or institution here at the present time?

A. Yes. I am president and director of the Truesdail Laboratories here in Los Angeles.

Q. What is the nature of the work that is carried on at the Truesdail Laboratories?

A. Our work is essentially in the field of chemistry and bacteriology.

Q. Are you affiliated with any scientific institutions or organizations?

A. Yes I am.

Q. Will you tell us some of them?

A. Well, I am a Fellow in the American Institute of Chemists; and also a Fellow in the American Association for the Advancement of Science; a charter member of the Institute of Food Technologists; and a member of the American Chemical Society, the American Public Health Association, and the Biochemical Society of Great Britain.

Q. How many years have you been engaged in nutritional research work?

A. Well, I have been doing work in nutrition since 1925.

Q. In the course of that work, have you had occasion to study vitamin D?

A. Yes, I have. [246]

Q. Have you ever done any work in experimentation with vitamin D, to determine its pres-

(Testimony of Dr. Roger W. Truesdail.)

ence in animals and the effect of different supposed sources of vitamin D in animals?

A. Yes. Our work has been involved in the biological testing of various food and pharmaceutical products, and also processes involving the creation of vitamin D.

Q. And have you been engaged in that study for the same period of time?

A. Well, the work that I have done in vitamin D has been done primarily during the past 12 years.

Q. Can you outline to us, in a general way, what your work has been with respect to vitamin D?

A. Well, yes. We have done work in the field of determining the vitamin D content of pharmaceuticals and food products, and have also conducted laboratory investigations to develop processes for the creation of vitamin D in various food products.

Q. Had you been engaged in that work prior to February 20, 1935? A. Yes, I had; yes, sir.

Q. Extensively or was that the beginning of your work?

A. No. As I stated previously, the beginning of my interest in this particular vitamin work dates back approximately 12 years from now.

Q. Do you know Mr. Warren, seated beside me at the counsel [247] table? A. Yes, sir.

Q. Have you examined the Life Lite cold quartz lamp that is manufactured by Ultra-Violet Products, Inc., the respondent in this case?

(Testimony of Dr. Roger W. Truesdail.)

A. Yes.

Q. Have you physically examined any of those Life Lites?

A. Yes, I have. As a matter of fact, I have owned one.

Q. Have you used it?

A. Yes, I have used it in my own home.

Q. Did you at some time during the year 1935 conduct experiments with respect to that Life Lite, meaning the cold quartz light sold under the trade name, Life Lite, which is produced by the respondent here?

A. Well, our work on that was done approximately at the beginning of 1935.

Q. At whose instance did you do that work?

A. At Mr. Warren's, as one of our clients.

Q. When you say "our clients", whom do you mean? A. My client.

Q. At what place did you conduct your experiments?

A. Well, at that time they were conducted in my laboratories in the Bendix Building here in Los Angeles.

Q. With what light did you conduct the experiments?

A. Well, those particular experiments were conducted with [248] the regular home Life Lite, the lamp that I see there on the table, as near as I can tell.

Q. Do you refer to the hand model Life Lite?

A. Yes, the hand model, with the timing device.

(Testimony of Dr. Roger W. Truesdail.)

Q. In the course of that experimentation, did you get burned yourself? A. No, I never did.

Trial Examiner Reardon: Is that the lamp, to further identify it, that has the instructions in Commission's Exhibit 1 and 2?

Mr. Tolin: Yes.

Trial Examiner Reardon: I see.

Mr. Tolin: I don't think that the witness saw those instructions.

Trial Examiner Reardon: All right. I just wanted to know.

Mr. Lyon: Why not ask the witness if he saw the instructions for the use of that lamp?

Mr. Tolin: All right.

Trial Examiner Reardon: I just wanted to connect it up with something we had in the record here.

By Mr. Tolin:

Q. I show you Commission's Exhibit 1, and ask you if you have ever seen that before?

(Handing document to witness.) [249]

A. Well, I have seen instructions similar to this. I don't know whether it was this particular one, but it was similar to this.

Q. You are not familiar with this particular exhibit?

A. I don't recall this particular exhibit here.

Q. I show you now Commission's Exhibit 9 and ask you if on that Exhibit 9 you recognize a picture of the type of Life Lite with which you conducted the experiments?

(Testimony of Dr. Roger W. Truesdail.)

A. Yes. The one on the back here, this hand lamp here (indicating).

Mr. Tolin: May I mark a figure there? What would you suggest?

Mr. Lyon: Why not have the witness describe it as described in that particular circular, the model number, and so on?

Mr. Tolin: All right.

Trial Examiner Reardon: Let him mark an "X". Let the witness put an "X" immediately near that one that he indicates to be the one that he means on the exhibit.

The Witness: Well, this particular type here (indicating), the one with the timing device, is the one that I used.

Mr. Tolin: The witness indicates Model A.

The Witness: I don't know what the difference is between that and this one (indicating), but this looks like [250] the one.

Mr. Tolin: He also indicates Model DL, saying he doesn't know what the difference between Model DL and Model A is, and indicates Model A as the one he used in conducting the experiments.

By Mr. Tolin:

Q. Is that right? A. That is correct.

Q. That being Model A, as it appears on Commission's Exhibit 9.

Now, what was the objective in the experiments?

A. The objective was to determine whether the light from this particular lamp that was submitted

(Testimony of Dr. Roger W. Truesdail.)

for investigation would cure, cause again a recalcification, in rats that had been made rachitic.

Q. Do you know whether rats are used commonly as a basis of investigation in subjects of that kind?

A. The rat is the only accepted animal at the present time, commonly used in laboratories for vitamin D tests or assays.

Q. How many individual rats have you experimented upon?

A. Well, I would think that I had probably had under my supervision or under my direct control possibly 10,000 animals or more.

Q. That is, animals that were being used for experimental [251] work?

A. For vitamin D work solely.

Q. Now, what did you do by way of experimental work with rats in this work that you did by way of testing the ultra-violet cold quartz light manufactured by the respondent?

A. Well, the technique that was used is that commonly employed for vitamin D assay work.

It essentially is this: To take young rats at weaning period, which is 28 days of age, and place them on a diet which is devoid of vitamin D, and by feeding them on this diet solely, within 18 to 21 days to produce a severe case of rickets in the animals on this particular diet.

At that time these rats were placed in individual cages, and different animals were carried through the ten day test period, but really were divided

(Testimony of Dr. Roger W. Truesdail.)

into four different groups: one, was the negative control group, which received no treatment whatsoever. They continued, in other words, on the vitamin D deficient diet. Members of other groups were placed under the light. The first group was placed under the light for two seconds each day during the ten day experimental period, with the light at a distance of approximately one inch from each of the animals of that group. In the second group the animals were placed also one inch away from the light and exposed for five seconds daily, and the third group were placed one inch away from the light, and [252] were irradiated with the light for ten seconds each day.

At the end of the ten days all of the animals were sacrificed, and the tibiae were removed from the animals and given what is known as the Johns Hopkins Line Test Technique, and the degree of recalcification that had been established in these previously rachitic bones was determined. That, essentially, is the technique, the result of which—

Q. We wanted the technique first. We are taking this up step by step. A. Yes.

Q. Now, Doctor, you said you used the commonly employed method. What do you mean by that? I don't mean for you to tell it over again, but by what do you establish that that is the commonly represented method?

A. Well, that is the method that now has become the U.S.P. method for determining the vitamin D content in foods. The only alteration be-

(Testimony of Dr. Roger W. Truesdail.)

Trial Examiner Reardon: So I will overrule the objection.

Mr. Tolin: Will you read the question again to the witness, please?

(The question referred to was read.)

The Witness: We found that there was a definite healing of rickets in all animals which were exposed for [255] the stated periods of time. The value, however, was interpolated into a conclusion that animals on the average which were exposed for five seconds per day at one inch distance during that ten day period gave a unit degree of healing, and that this corresponded at that time to 1 ADMA unit of vitamin D. The term U.S.P. unit at that time in vitamin D had not been formulated, but the conversion factor which is now accepted for ADMA units and U.S.P. units makes the healing correspond to about a third of the U.S.P. unit. That is, the light effect itself was equivalent to the administration of one-third of a U.S.P. unit per rat per day.

By Mr. Tolin:

Q. That was the result as to the rats that had the minimum amount of light?

A. I don't recall whether the report was 2 or 5. I had recalled that it perhaps was three seconds, but I don't recall whether the report shows 2 or 5.

Q. Well, Doctor, did you make a written report to the Ultra-Violet Products, Inc.?

A. Yes, we submitted a report, with the result of our findings.

(Testimony of Dr. Roger W. Truesdail.)

Q. At that time, however, it was, I think the Ultra-Violet Home Products, was it not?

A. I believe that was the name at that time, yes.

[256]

Q. But the work was done primarily at the instance of Mr. Warren, who is present here today?

A. That is correct.

Q. And the report was rendered to him?

A. Yes.

Q. Did you prepare that report yourself?

A. Yes, I did.

Q. Would you recognize it, if you were to see it again? A. Yes, I know I would.

Q. I show you what appears to be a report by Rogert W. Truesdail, Ph.D., bound in a black volume, the title page of which says, "The cure of rickets in rats exposed to the radiations of the 'Life Lite' lamp,—April 24, 1935, laboratory No. 736", and ask you if you recognize that as the report which you prepared?

(Handing document to witness.)

A. Yes, I do.

Q. Did that report truly and fully reflect the results of your research on the subject that you have testified to? A. It did.

Q. Refreshing your recollection from this report, Doctor, can you tell us in any greater detail just to what extent the experimental animals responded to the effects of the light?

A. Well, even the animals exposed here for two

(Testimony of Dr. Roger W. Truesdail.)

seconds daily showed a very definite healing of rickets, as evidenced [257] by this data here.

Q. Indicating Table 1? A. Yes, Table 1.

Q. Can you explain for the record the legends that are used on these tables, or can you point out in the report a place where that can be determined?

A. Yes, I can do it, or there is a legend here following table IV that gives the interpretation of the results.

Q. Then I think that table will be sufficient, without asking you to go into it more orally.

Now, there appears to be a photographic chart I, beneath which are the words, "Tibiae Sections of Rats Receiving Steenbock-black ricket-producing diet No. 2965, and a 2-second daily irradiation with a 'Life Lite' ultraviolet lamp." Can you state in a little more detail what these four photographs are photographs of, and can you interpret what you see there?

A. Well, yes. These are the longitudinal sections of the tibiae. That is the long leg bone, taken from the experimental rats in this particular group, and these photographs show the result of staining the bones, and, essentially, show the line or the degree of recalcification that has occurred during the ten day experimental period.

We interpret those in pluses, all the way from one to plus six, in which plus one indicates that there is just a [258] slight degree of recalcification or healing, and two-plus indicates slightly more,

(Testimony of Dr. Roger W. Truesdail.)

but the unit degree of healing is three-plus, in which there is a continuous line of recalcification across the head of the bone. For instance, this bone here (indicating)——

Q. Indicating the bone in the upper right hand corner of the photograph, Chart I?

A. Yes, No. 3547, shows a higher degree of healing than 3544, and, likewise, 3550 shows a better degree of healing here than does 3549.

Q. Were those bones, 3544, 3547, 3549 and 3550 all from rats that received the same treatment?

A. Yes, that is true, the two seconds daily irradiation.

Q. Now, turning to photographic chart II, in which there appear to be six photographs, and the typed matter underneath them, "Tibia sections of rats receiving Steenbock-black ricket-producing diet, No. 2965, and a 5-second daily irradiation with a 'Life Lite' ultraviolet lamp". Can you elaborate further upon what is reflected by these pictures?

A. Yes. As compared to the tibiae photographs in the previous photograph, Chart I, all of these bones show a greater degree of healing than the previous bones. That is, in general, here the healing was considerably more than those with the two-second irradiations, as evidenced by the bone photographs themselves. [259]

Q. Do these bones show a condition of the rats having been entirely cured of rickets?

A. Well, no. These are not completely healed, because if they were completely healed, this osteoid

(Testimony of Dr. Roger W. Truesdail.)

tissue here would have been filled in with calcium phosphate.

Q. I notice in these photographs, Doctor, both those on photographic chart I and those on photographic chart II, and also on photographic chart II continued, and photographic chart IV, that a portion of the bony substance that is photographed is dark, and then there is a considerably lighter, almost white area. What is the difference between those two?

A. You have reference to this particular light area above the degree of healing?

Q. Yes. A. Such as this (indicating)?

Q. Yes.

A. That is the normal cartilage, what we call the normal cartilage disc of the bone. That never does heal. That is there in a normal bone.

Q. Yes. Then that is cartilage, and the darker portion is the bone?

Q. Yes, sir. That is, the bone structure itself is the dark. In this technique the bone is immersed in silver nitrate and it reacts with the calcium phosphate of the bone [260] to form silver phosphate, but silver phosphate is of a yellow color and doesn't photograph well, so what we do is expose the bones to daylight or to an ultra-violet light, and the actinic rays present cause a reduction of the silver phosphate to metallic silver, which is black, and thus what we see here is actually, while it is actually silver, reduced silver, it is itself what

(Testimony of Dr. Roger W. Truesdail.)

was formerly calcium phosphate or true bone structure.

Q. Now, if you were to indicate, using photographic chart I, what portion of that photograph shows the healing of rickets? What would you point out, and in pointing it out bear in mind that we are trying to do so for the record, so that a reviewing board looking at this exhibit and reading the record will get it, so do it with that in mind rather than showing me here.

A. Well, I lost the first part of your question. Would you mind giving it to me again?

(First portion of question read.)

A. I would point out the part of the bone below the cartilage disc, which shows black on the photograph.

Q. The cartilage disc is the considerably lighter portion between the dark part at the very top of the bone; is that right?

A. That is true. Yes, it is a disc that goes across the head of the bone. [261]

Q. You say that there is evidence of healing on all of these?

A. Yes, sir. All of those show healing, yes.

Q. Now, referring to photographic chart II continued, will you interpret that for us?

A. Well, this chart shows essentially, that is, the degree of the healing here is essentially that of the previous photographs, with the exception of possibly one bone here, 3559, which shows a less degree of healing than any of the other bone sections

(Testimony of Dr. Roger W. Truesdail.)

RESPONDENT'S EXHIBIT No. 1A

Report by Roger W. Truesdail, Ph.D. consulting research biochemist and nutritionist, Los Angeles, California.

The Cure of Rickets In Rats Exposed to the Radiations of

The "Life Lite" Lamp

April 24, 1935

Laboratory No. 736

Ultra-Violet Home Products, Inc.

6158 Santa Monica Blvd.,

Los Angeles, California

Introduction

The research of several scientists has indicated that the radiations from the cold quartz lamp are strongly antirachitic, i.e. they have the ability to prevent and cure rickets. A Life Lite Cold Quartz Lamp was submitted to these laboratories for experimentations on February 20, 1935.

Objective

To determine the antirachitic properties of the radiations from the Life Lite Lamp by exposure of ricketic rats to them.

Experiments

Essentially the general Vitamin D "Line Test" method as recommended by the Vitamin Assay Committee of the American Drug Manufacturer's

(Testimony of Dr. Roger W. Truesdail.)

Association, (Journal of the American Pharmaceutical Association, vol. 20, pg. 588, 1931) has been employed.

Albino rats of the Wistar strain were weaned from mothers receiving the standard Breeder's Diet, when they were 28 to 32 days old and weighing 50 to 60 grams each. They were fed the Steenbock-Black Ricket-Producing Diet, No. 2965, ad libitum and distilled water. After 18 to 21 days on the rachitic diet, they were examined to determine the stage of rickets attained. The extent of rickets was determined by examination of a tibia section, properly prepared. When this examination was satisfactory the remaining rats of the litter were placed in individual cages and continued on the ricket-producing diet. These rats, suffering severe rickets, were individually irradiated with the Life Lite lamp for exposures of 2, 5 or 10 seconds, daily for 8 days. The animal was placed in a small box and the lamp burner held approximately one inch from the animal. A stop watch was used to accurately time the exposures. One rat of each litter, known as the negative control, received no irradiation.

At the conclusion of the 10th day of the experimental period, all animals were killed and the tibias removed. One tibia from each rat was given the staining technique, was then microscopically examined and later photographed. The interpretation of the degree of healing must be made by carefully examining both the tibia of the animal killed at

(Testimony of Dr. Roger W. Truesdail.)

the 18 to 21 day period termination, and the tibia of the control of the same litter.

In measuring the vitamin D content of foods, or pharmaceuticals, a unit of vitamin D is the minimum average daily amount of the sample (this being the total amount of the sample given divided by the length of the test period, 10 days) required to produce a continuous narrow line across the metaphysis of the leg bones in 4 out of 6 rats under the conditions as specified above. This continuous narrow line would correspond to a degree of + + +.

Data—Conclusions

Tables I-IV and Photographic Charts I-IV (eliminating a Chart III) contain the data and tibia photographs of this investigation. Photograph V shows the method of irradiation employed. The 2-second daily irradiation of four rats produced a + + degree of healing in two of them and a + + + unit degree of healing in the other two. Twelve animals receiving a 5-second daily irradiation showed an average degree of recalcification slightly in excess of unit healing while the average for the three receiving a 10-second daily irradiation was slightly higher. The three negative controls remained severely rachitic.

The data of this investigation indicates that a 5-second irradiation with the Life Lite lamp, under the stated conditions, is equivalent in its antirachitic

(Testimony of Dr. Roger W. Truesdail.)

effect to at least one A.D.M.A. unit of the "Sunshine" Vitamin D.

Respectfully submitted,

[Seal]

TRUESDAIL LABORATORIES,
INC.

ROGER W. TRUESDAIL

ROGER W. TRUESDAIL, Ph.D.

Director

TABLE I

"Line Test" Report Upon Rats Receiving Steenbock-Black Ricket-Producing Diet, No. 2965, and a 2-Second Daily Irradiation With a "Life-Lite" Ultra-Violet Lamp.

Rat & Litter Number	Degree of Healing or Recalcification*	Weight Gain Gm.—10 Days	Food Intake Gm.—10 Days
M 3544-3543	+	6	94
F 3547-3543	+	11	105
F 3549-3543	+	9	82
F 3550-3543	+	14	106
Average		8	97

* See Legend Following Table IV.

TABLE II

"Line Test" Report Upon Rats Receiving Steenbock-Black Ricket-Producing Diet, No. 2965, and a 5-Second Daily Irradiation With a "Life-Lite" Ultra-Violet Lamp.

Rat & Litter Number	Degree of Healing or Recalcification*	Weight Gain Gm.—10 Days	Food Intake Gm.—10 Days
M 3551-3551	+	9	100
M 3552-3551	+	9	96
F 3553-3551	+	5	98
F 3555-3551	+	13	115
F 3556-3551	+	7	93
F 3557-3551	+	7	85

* See Legend Following Table IV.

(Testimony of Dr. Roger W. Truesdail.)

M 3558-3558	+ + +	10	88
M 3559-3558	+	8	84
M 3561-3558	+ +	14	91
M 3562-3558	+ + + +	7	86
M 3563-3558	+ +	5	78
F 3564-3558	+ +	4	82
Average		— 8	— 91

TABLE III

“Line Test” Report Upon Rats Receiving Steenbock-Black Ricket-Producing Diet, No. 2965, and a 10-Second Daily Irradiation With a “Life-Lite” Ultra-Violet Lamp.

Rat & Litter Number	Degree of Healing or Recalcification*	Weight Gain Gm.—10 Days	Food Intake Gm.—10 Days
M 3543-3543	+ + +	17	105
F 3545-3543	+ + + +	14	108
F 3548-3543	+ + + +	11	103
Average		— 14	— 105

TABLE IV

“Line Test” Report Upon Rats Receiving Steenbock-Black Ricket-Producing Diet, No. 2965, and no Daily Irradiation (Controls).

Rat & Litter Number	Degree of Healing or Recalcification*	Weight Gain Gm.—10 Days	Food Intake Gm.—10 Days
F 3546-3543	0	12	110
F 3554-3551	0	9	100
M 3560-3558	0	6	82
Average		— 9	— 97

* See Legend on Following Page.

(Testimony of Dr. Roger W. Truesdail.)

Legend:

O=Severe rickets.

=Slight indications of recalcification one-third
across.

+=Narrow line—approximately two-thirds across.

+=Narrow continuous line or recalcification
(Unit healing).

+=Broad continuous line of recalcification.

+=Broad continuous line of recalcification extend
ing into shaft.

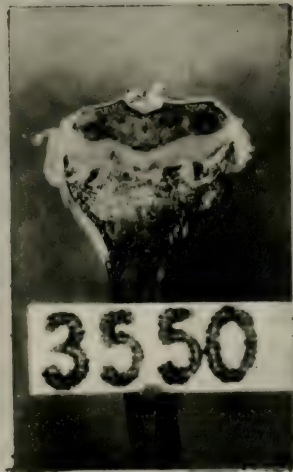
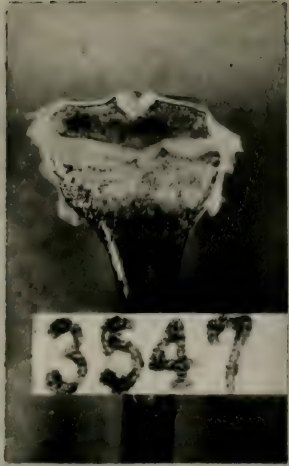
C=Complete healing.

M=Male

F=Female

[Endorsed]: Filed June 1, 1943.

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1



FEDERAL TRADE COMMISSION
Docket No. 4407
IN THE MATTER OF *Ultra-Violet Corporation*
DATE *5/29/41* W. NESS
BY *J. H. Fisher*
ETHEL E. FISHER ASSOCIATES, INC.

PHOTOGRAPHIC CHART I

TIBIA SECTIONS OF RATS RECEIVING STEENBOCK-BLACK RICKET-
PRODUCING DIET, NO. 2965, AND A 2-SECOND DAILY IRRADIATION
WITH A "LIFE-LITE" ULTRA VIOLET LAMP



PHOTOGRAPHIC CHART II

TIBIA SECTIONS OF RATS RECEIVING STEENBOCK-BLACK RICKET-

PRODUCING DIET, NO. 2965, AND A 5-SECOND DAILY IRRADIATION

WITH A "LIFE-LITE" ULTRA VIOLET LAMP

IN THE MIDDLE OF

DATE

4457
 Ultra-Violet Products
 7/29/44
 Treadwell
 Zeller



PHOTOGRAPHIC CHART II

(CONTINUED)

FEDERAL TRADE COMMISSION
 Docket No. 4407 ~~Exhibit No. 1-K~~
 IN THE MATTER OF *Ultra-Violet Products*
 DATE *1/29/41* BY *John*
John



3343



3354



3360

4497 ~~1-L~~
 Ultra-Violet Protons
 Irradiated
 3/24/41
 J. H. Hines

PHOTOGRAPHIC CHART IV

TIBIA SECTIONS OF RATS RECEIVING STEENBOCK-BLACK RICKET-
 PRODUCING DIET, NO. 2965, AND NO DAILY IRRADIATION
 (CONTROLS)

(Testimony of Dr. Roger W. Truesdail.)

Mr. Tolin: The complaint says that the use of the device will not produce a chemical reaction in the body, and it further says——

Trial Examiner Reardon: This is a talk between you and Mr. Lyon?

Mr. Lyon: Off the record.

Trial Examiner Reardon: Off the record.

(There was a discussion off the record.)

The Witness: I was just checking here. The only photographs I do not find there are the ones for this third table, and they should be Chart III, which is not in the report. [264]

By Mr. Tolin:

Q. Do you find this report at this time incomplete?

A. I find an omission of one set of tables, which is Chart III, should be Photographic Chart III. As a matter of fact, the degree of healing on this other chart on the average is even better than the previous one, as far as the healing goes, but they are not recorded in here.

Q. Well, while Mr. Warren looks to see if he can find those, can we pass over to Chart IV, Photographic Chart IV, which has been marked 1-L, "Tibia sections of rats receiving Steenbock-black ricket-producing diet No. 2965, and no daily irradiation (control)"?

A. Yes.

Q. What does that show?

A. Well, those photographs show that the animals that received no irradiation likewise show

(Testimony of Dr. Roger W. Truesdail.)

no degree of healing of rickets. There is no black bone—there is no formation here, as evidenced by the failure to photograph black.

Q. Would you show to the Examiner this Photographic Chart II, being Exhibit 1-K, and point out to him where the healing of rickets is reflected?

Trial Examiner Reardon: Do you want to see, Mr. Lyon, what he wants?

The Witness: Now, prior to the actual irradiation, if there had been no irradiation, there had been no creation [265] of vitamin D at all in that animal, there would have been no healing, as evidenced here, you see (indicating).

Trial Examiner Reardon: “As evidenced here”, you are pointing to photograph 3558, aren’t you?

The Witness: Yes, sir.

Trial Examiner Reardon: And pointing to a black line underneath the top circumference?

The Witness: That is correct.

Trial Examiner Reardon: All right. Go ahead.

The Witness: Whereas over here (indicating)——

Trial Examiner Reardon: “Over here”, where are you now?

The Witness: On Chart IV, whereas on Chart IV——

Trial Examiner Reardon: On Respondent’s Exhibit 1-L.

The Witness: ——there is no evidence, for instance, in 3554 of any recalcification across the head of the bone whatsoever.

(Testimony of Dr. Roger W. Truesdail.)

Trial Examiner Reardon: Because there is no black line photographed; is that it?

The Witness: That is right. The same is true of 3546 and 3560. This material here (indicating) is just photographic shadows and shows no calcification.

By Mr. Tolin:

Q. Now, did any of the rats that were used as controls and [266] which received no irradiation from the respondent's Life Lite show any recovery at all from rickets?

A. All those rats which did not receive irradiation showed no healing of rickets.

Q. Were there any rats that received irradiation from respondent's Life Lite that failed to show at least partial recovery from rickets?

A. No, all of them showed some degree of rachitic healing.

Q. Did you administer to any of those rats any other source of vitamin D during the time that you were conducting the experiments?

A. No, sir.

Q. I want to ask Mr. Warren a question before I put another to the witness.

Doctor, how did you apply the ultra-violet light to these rats?

A. We placed these rats in a small cardboard box or carton, so that we could keep them immobilized to a great extent, and then we placed the light directly down on the box, resting on it,

(Testimony of Dr. Roger W. Truesdail.)

and the distance between, the average distance, at least, between the hair of the rat and the lamp itself was about an inch. And that is the way they were irradiated, and they were definitely timed each day for each animal.

Q. Were they each irradiated while they were at liberty in a cage, where any of their food was lying about? [267]

A. Oh, no. The method is to keep these animals in a dark room, where they get no light from any source except an incandescent light which does not have any curative effect on rickets, and they were kept in our regular dark room where all vitamin D animals under test are kept.

Q. So they received no sunlight during this period?

A. Oh, no. There was no light in the room, no daylight in the room.

Q. I asked you about the possible presence of the food-stuff, because I find in the writings of someone who had conducted experiments upon rats, that there is a question as to the validity of some experiments upon the basis that the rats were irradiated in cages about which there were portions of their food, and that it was possible that the food had the vitamin D activity, and the rat then obtained the vitamin from eating the food.

A. That might be possible if that was done that way, but we did not irradiate them in the cages.

Q. So that can you tell us positively that, so far as these tests were concerned, there was no

(Testimony of Dr. Roger W. Truesdail.)

possibility of anything that the rats afterwards consumed orally being irradiated by this ultra-violet light?

A. No. The rats received nothing except the regular Steenbock No. 2965 rickets-producing diet, which had not been exposed to any ultra-violet light.

[268]

Q. Would you say that the production of vitamin D by the methods that you have described amounted to a chemical change in the body of the rat subjects?

A. Well, the vitamin D which was created in the skin by the irradiation process is actually the material which governs calcium and phosphorous metabolism in the body of the rats.

Q. And calcium and phosphorous metabolism in the rats was affected by the presence of vitamin D?

A. Yes, sir.

Q. What was the effect upon it?

A. The effect that the calcium and phosphorous which had been present in not only the alimentary tract of the animal, but also in the blood stream of the animal, was made available and utilized in forming new bone tissue by forming tri-calcium phosphate.

Q. Is that, in your opinion, a chemical change in the body?

A. Well, yes, certainly. It would be a formation of tri-calcium phosphate, which would be a chemical change.

Q. Is it so considered by all chemists?

(Testimony of Dr. Roger W. Truesdail.)

A. My opinion would be that they would consider it that.

Q. It is recognized as a chemical change, is it not, by all of the standard instructors and writers upon the subject, of which you have any knowledge?

A. I believe it is. [269]

Q. What work did you do with respect to a patent involving vitamin D?

A. We did work showing that when various food and feed stuffs were irradiated with ultra-violet light that vitamin D was created in them by that irradiation.

Q. What type of ultra-violet light did you use for that purpose?

A. Well, we used different sources. The two sources we experimented with was the cold quartz and the carbon arc lamp.

Q. Do you know what the angstrom units of the carbon arc were, which you used?

A. I don't recall now, because I used special carbons which gave a biological band some place below or around 3100.

Q. A light which emits in that radiation, around 3100, is generally considered in a different classification than one which emits lower than that, is it? Or is there a dividing line somewhere in there?

A. Well, there are different bands of specific and definite wave lengths that are known as biologically active bands, and there are several of those bands. One of them is around that 3100 angstrom unit wave length, and there is also appar-

(Testimony of Dr. Roger W. Truesdail.)

ently one down around 2537 to 2540, for the reason that we were actually able to create vitamin D in food and feed stuffs by exposing them to the light from cold quartz. [270]

Q. Do you know what angstrom unit is emitted from cold quartz?

A. Well, my understanding is that between approximately 90 to 92 per cent of the light is around 2540 angstrom units.

Q. Would you say that that was the type of light that was used by you in these experiments that you made for Mr. Warren?

A. Yes, that is true.

Q. Approximately 2540 or 2537 angstrom units?

A. Yes, that is right.

Q. Would there be any practical distinction between a cold quartz light which emitted 2540 angstrom units, and one which emitted 2537 angstrom units? A. No.

Mr. Tolin: You may cross examine.

Cross Examination

By Mr. Lyon:

Q. What is rickets, Doctor?

A. Rickets is a disease as a result of improper calcium and phosphorous metabolism.

Q. And that is a disease condition of the human body, as well as in animals, is it?

A. Yes, sir.

Q. In what individuals would it commonly occur?

(Testimony of Dr. Roger W. Truesdail.)

A. Well, rickets is primarily a disease of infants and [271] growing young.

Q. Up to what age?

A. Well, generally, it shows up to the age of approximately ten years of age.

Q. It is not ordinarily found in individuals over ten years of age?

A. Not normally, as defined as rickets, although there may be improper tooth eruption, which is believed to be due in many cases to a deficiency either of vitamin D, or of calcium and/or phosphorous.

Q. It is really a disease of children then?

A. Primarily, a disease of children.

Q. What is the ordinary and common cause of rickets in children?

A. Well, the ordinary cause is a deficiency of vitamin D.

Q. And that is caused by a deficiency in the diet, ordinarily, is it?

A. Primarily in the diet.

Q. What specific deficiencies in the diet would ordinarily cause rickets in children?

A. Well, it happens to be that vitamin D is the scarcest of any of the vitamins naturally occurring in foods, so that unless the child has either irradiation from sunlight or artificial irradiation from some lamp source, they develop rickets, unless that vitamin D is substituted in their diet [272] from either a pharmaceutical or a food enhanced source.

Q. How about milk as a source of vitamin D?

(Testimony of Dr. Roger W. Truesdail.)

A. Unless milk is irradiated or the cow is fed vitamin D, so that she can metabolize vitamin D in the milk, milk is considered a very poor source of vitamin D.

Q. Well, in your opinion, would the average diet of the normal infant be sufficient to prevent the development of rickets?

Mr. Tolin: Objected to as irrelevant, incompetent and immaterial.

Mr. Lyon: I am trying to find out if it is necessary in most cases or in many cases to have any ultra-violet irradiation of any kind, in addition to normal diet, to prevent rickets. I think it is a perfectly natural and proper question.

Mr. Tolin: No particular diet or milk is being complained about here.

Trial Examiner Reardon: No. This is a question of this product.

Mr. Lyon: Also, there is no allegation as to rickets. That is why I originally objected to the entire line of questioning.

Trial Examiner Reardon: I overrule the objection.

Mr. Lyon: Will you answer that last question, please? [273]

The Witness: May I have that question again, please?

Trial Examiner Reardon: Read the question.

(The question referred to was read.)

The Witness: Not unless the child or infant

(Testimony of Dr. Roger W. Truesdail.)

receives an additional source of vitamin D, either through some pharmaceutical source, such as cod liver oil, or by irradiation through some artificial source, such as an ultra-violet lamp.

By Mr. Lyon:

Q. Well, is rickets a common disease among children?

A. Very common, unless these things are administered.

Q. What proportion of children would you say would have rickets?

A. Well, as measured, if you take as a standard dental caries, which is believed to be a symptom of rickets, they run anywhere from 75 to 85 per cent of the children which have some dental caries of the tooth structure definitely.

Trial Examiner Reardon: That ran before the discovery of vitamin D, and its effectiveness?

The Witness: Oh, yes. It used to be very much worse than it is now. I am quoting from scientific literature on the occurrence of dental caries among pre-school children that have been examined.

By Mr. Lyon:

Q. What has been the basis of your nutritional work? Have [274] you had any experience with children in that respect?

A. No. My work has been primarily—in this particular field has been primarily with animal experimentation.

Q. In your experimentation you have tried to

(Testimony of Dr. Roger W. Truesdail.)

develop by these artificial means the rachitic conditions which may occur in children?

A. Yes. That is the condition that we produce in these rats by putting them on a vitamin D deficient diet. We produce in them what we call severe rickets.

In children you find that same thing where the bone structure is so soft that they either have knock knees or bow legs due to improper calcification.

Q. Those are natural conditions, and the conditions you have produced are artificial conditions to simulate them? A. That is true.

Q. I believe you stated on direct examination that, in your opinion, the use of respondent's device would produce a chemical reaction in the human body. Is that correct? A. That is true.

Q. What would be that specific chemical reaction?

A. That specific chemical reaction would be a catalytic effect, which would permit the union of calcium and phosphorous ions to produce the chemical compound tri-calcium phosphate in the bones.

Q. In your opinion, is that the cause of the improvement [275] that you found in your experiments with the use of the ultra-violet ray?

A. Absolutely.

Q. It was due to that chemical reaction?

A. Yes, due to that formation.

Q. Now, would you say that that chemical reaction would have any effect upon the blood stream?

A. Well, only as it changed the concentration

(Testimony of Dr. Roger W. Truesdail.)
of the calcium and phosphorous ions in the blood stream itself.

Q. Would it keep the blood stream in balance, so to speak? Do you recognize any such term as that?

A. I don't recognize it by that particular expression.

Q. Is there such a thing as a normal alkaline acid of the blood?

A. Oh, yes, that is always true.

Q. What do we mean by that?

A. Well, that normal alkaline acid balance merely means the P.H. of the blood is absolutely neutral, and that occurs where you have not only adequate numbers of calcium and phosphorous ions, but other acid and base forming ions as well.

Q. What do you mean by "P.H."?

A. Well, the P.H. is the reciprocal of the log of the hydrogen ion concentrates, and it is actually an empirical measure of either acidity or alkalinity.

[276]

Q. We are getting into a little deep water here. Can you put that in a little plainer language for the layman, Doctor?

A. Well, the P.H., when you have a neutral solution that is neither acid, nor base, the P.H. of that general solution is 7. If you increase the acidity, the P.H. value becomes less than 7. If you increase the alkalinity, the P.H. becomes greater than 7. In other words, a solution with a P.H. 6 is definitely acid, and a solution with a P.H. of 8 is definitely alkaline.

(Testimony of Dr. Roger W. Truesdail.)

Q. From your experiments, would you have an opinion as to whether or not respondent's device would have an antacid effect?

A. Would have a what?

Q. An antacid effect. A. Anti?

Q. Yes, antiacid.

A. Well, when you start to utilize the calcium and phosphorous, I don't see myself how you would have actually either an antiacid or an antialkaline effect. What you are starting to do is using ions. Calcium is alkaline forming, and that is a cellular reaction, and phosphorous is acid forming and gives an acid reaction. So that it seems that the utilization of both calcium and phosphorous would not primarily change either the acidity or the alkalinity of the body tissue itself. [277]

Q. The one would offset the other; is that true?

A. Yes, that is what I have in mind.

Q. In other words, you say the use of respondent's device here, the Life Lite lamp, would not have any alkalizing effect upon the body?

A. It would have neither alkalizing, nor acidifying effect.

Q. Therefore, it would have no effect to change the balance of the blood stream, so far as the acid and alkaline factors are concerned; is that correct?

A. Only as it would affect the calcium and phosphorous themselves.

Q. Now, would that have anything to do with

(Testimony of Dr. Roger W. Truesdail.)

overcoming the deficiency of the white or red corpuscles? A. Not in my opinion.

Q. It would have no effect upon the blood itself?

A. Other than the effect upon utilization of the calcium and phosphorous.

Q. What does that affect?

A. Well, that affects the bone formation in the body.

Q. That is, it is a chemical reaction of the phosphorous and calcium that produces the vitamin D; is that correct?

A. No. You could have—may I state an example?

Q. Yes.

A. You may have an individual who has in his diet all [278] of the calcium and phosphorous required for normal bone structure formation and tooth formation, but unless you have either vitamin D there in the body, either by irradiation or by oral intake, the calcium and phosphorous is not utilized in the body and is simply excreted in the urine and feces, without being fed. That is why we call vitamin D a catalyst. It causes the utilization of the calcium and phosphorous that is going through the alimentary tract of the body.

Q. Would you say that the use of the respondent's product would have any tonic effect on the blood?

A. I don't know what you mean by "tonic".

Q. Well, is there such an expression recognized by nutritionists?

(Testimony of Dr. Roger W. Truesdail.)

A. Not "tonic effect." It might have a stimulative effect, that is, a temporary stimulative effect, but I wouldn't think of it as a general toning up of the entire body.

Q. Is rickets one disease or is it a combination of diseases, or a symptom of a disease, or just what is it?

A. Rickets is considered to be a definite disease itself.

Q. Would it have anything to do with any other diseases, either as a symptom or a cause, or is it just one specific disease?

A. Well, rickets itself is a specific disease, but there are other related diseases that are similar to rickets, that are also caused by improper calcium and phosphorous [279] metabolism; such diseases as osteomalacia and osteophthisis, which are actually a disease where the bone structure is not normal, and they are in a sense somewhat similar to rickets, because they are all concerned with the proper calcium and phosphorous metabolism.

Q. Do you recognize the use of a term, "normalizing the body chemistry"?

A. Well, I have heard it before.

Q. What does it mean?

A. Well, I think it is—to me, it is an all-inclusive term, and it does not mean anything specifically.

Q. It is too vague to be of any material——

A. I think it is a little broad.

Q. In your opinion, would the use of respond-

(Testimony of Dr. Roger W. Truesdail.)

ent's device have any effect to normalize the body chemistry?

A. I would say only as it applies to the calcium and phosphorous metabolism.

Q. That would be the only chemical effect it would have, in your opinion?

A. The chemical effect, yes, sir.

Q. In your opinion, would the use of respondent's device have the same effect in preventing rickets and related diseases as natural sunlight would have, or would there be any difference?

A. Well, I would say that for the actual calcium and [280] phosphorous metabolism, the light, the artificial light, is more effective than the natural sunlight, because it possesses a biological band in larger relative quantities even than sunlight.

Q. You mean the shorter rays would be more effective?

A. Yes, that is true. You can put food out in the sunlight and put milk out there, and you don't get a creation of very much vitamin D, but you can take an artificial source and produce vitamin D in it.

Q. How long did you continue these treatments on the rats that you used in your experiments?

A. Well, the test period was only for—was a standard period, which was ten days. That is the standard test for foods and pharmeceuticals as well.

Q. Is it an established principle in the use of ultra-violet light to have rest periods following the period of irradiation?

(Testimony of Dr. Roger W. Truesdail.)

A. No. You mean so far as animal experimentation is concerned?

Q. Yes.

A. Well, up until this time we were not aware of anything that had been done with actual irradiation of animals of a similar nature. They had, of course, been exposed to other sources of ultra-violet light, but the experiments were a daily irradiation that had not been performed before. [281]

Q. Is the use of an ultra-violet light, such as the respondent's product involved in this case, the commonly accepted method to prevent rickets in children, or is that used as an aid to such a treatment?

A. Well, the use of ultra-violet light irradiation, as such, is a common practice.

Q. Is it not true that the control of diet is also a very important element in the treatment and prevention of rickets?

A. Yes, proper diet, with the proper calcium and phosphorous ratio in the diet, is essential.

Q. It would be necessary to have both proper diet, as well as the use of the ultra-violet lamp, in your opinion; is that correct?

A. My opinion would be that you have to have proper diet as well as—if you are going to do this you must provide the proper amount of calcium and phosphorous in the diet.

Q. And the proper amount of diet would be sufficient, would it?

(Testimony of Dr. Roger W. Truesdail.)

A. If you incorporated the vitamin D in some supplemental source, along with that food supply.

Q. That is, by proper use of irradiated milk and butter and eggs, and other vegetables?

A. And nutritional adjuncts, such as cod liver oil or halibut liver oil, or any of the other sources of vitamin D. [283]

Mr. Lyon: That is all.

Redirect Examination

By Mr. Tolin:

Q. Is the presence of dental caries in an adult a symptom of a deficient calcium phosphorous metabolism?

A. Well, you become involved, because there are other factors there that are also necessary to maintain normal tooth structure. It is believed, however, that severe dental caries is probably due to the fact that either in the pre-natal period or the early infancy period or childhood period that there has been improper calcium and phosphorous metabolism in the body.

Q. It wouldn't mean, however, that if an adult were to develop dental caries at, say, 35 or 36 years of age, he was at that time suffering a defective metabolism as to calcium and phosphorous?

A. No. There are other factors involved besides calcium and phosphorous, I would say, at that particular age.

Q. Is there such a thing as an unbalanced metabolism as to calcium and phosphorous in an adult person?

(Testimony of Dr. Roger W. Truesdail.)

A. In my opinion, you may have an unbalanced calcium-phosphorous metabolism in an adult person due to a prolonged restricted diet.

Q. Would the use of a cold quartz light of the kind you testified to using on these rats be useful in a correction [284] of a faulty phosphorous-calcium metabolism in such an adult?

A. Yes, providing the diet itself was altered to provide the optimum of calcium and phosphorous.

Q. In substance, you mean that there might be an intake of calcium and phosphorous, and that when that calcium and phosphorous is there in the body that the use of the ultra-violet light enables the body to make use of it? A. That is true.

Q. Where did that calcium and phosphorous come from in the case of the rats that were fed the restricted diet?

A. Well, the calcium and phosphorous in those particular diets we produced—we actually produced rats in a diet in which the calcium and phosphorous intake is completely out of balance. That is one of the principles of the Steenbock No. 2965 diet, is to feed an unusually large amount of calcium and a relatively small amount of phosphorous, and because the ratio of the calcium to phosphorous is completely out of balance, and the fact there is no vitamin D in the diet and the further fact that the animals receive no light source of vitamin D, they develop rickets very quickly. As I said before, in about 18 to 21 days they have severe rickets. That is due to a combination of all of those factors.

(Testimony of Dr. Roger W. Truesdail.)

Q. Is vitamin D a necessary factor in the health of an adult,—an adult human being?

A. My general opinion, and that, I believe, of most [285] authorities, is that some vitamin D is desirable, but the actual requirements of the adult for vitamin D is unknown at the present time.

Q. Does a cold quartz light of the type manufactured by the respondent produce vitamin D in an adult human being?

A. In my opinion, it would develop vitamin D.

Mr. Tolin: Thank you, Doctor. That is all.

Mr. Lyon: Just a minute.

Recross Examination

By Mr. Lyon:

Q. Isn't it true that continued daily exposures with ultra-violet light would tend to inhibit the liberation of vitamin D in a human body rather than to liberate it?

A. Only if there was a pigmentation produced in the outer layer of the skin, such as severe tanning. In that case your penetration and absorption of your vitamin D would become increasingly limited. This is evidenced by the fact that people of dark pigmentation, such as the negroes, are the most susceptible individuals to rickets, and the reason for that is that the ultra-violet light is not absorbed, and so it is, therefore, thought by authorities, that when you produce a heavy tanning of the skin that you get less activation per unit of ultra-violet energy than you would if the skin was perfectly clear.

(Testimony of Dr. Roger W. Truesdail.)

Q. This unbalanced phosphorous and calcium condition of [286] the body that we have been talking about, is that an ordinary or usual condition, or is it unusual?

A. You are speaking now of the children or adults?

Q. Yes, I am speaking of either children or adults. In a human being.

A. Well, I can't answer that "yes" or "no." That depends, of course, upon their actual supply of vitamin D. If they are getting adequate quantities of vitamin D, then that condition would not tend to exist, provided you were getting an optimum quantity of the calcium and phosphorous.

Q. If they were getting the regular normal diet, in your opinion, would they be getting enough to get the balance of phosphorous and calcium they should have?

A. You mean by "normal diet" the average run of individuals?

Q. Yes, the average diet, if there is such a thing.

A. Well, in my opinion, the average diet is—from my own studies on human diets,—is deficient in calcium, phosphorous and vitamin D.

Q. If a person does eat a proper food in the proper amounts, in your opinion, would he have any such unbalanced condition as you describe?

A. If he gets what I call the proper diet, which is an optimum, he would not.

Q. And in such a case there would not be any need for ultra-violet irradiation? [287]

(Testimony of Dr. Roger W. Truesdail.)

A. No, if he ate what we call an optimum diet in nutrition.

Q. And the same thing would be true so far as infants are concerned, as to rickets, if the proper diet were given?

A. If an optimum diet were given, yes, sir.

Q. You say rickets do not occur in individuals over ten years of age, ordinarily?

A. Not normally.

Q. Just in infancy, however?

A. It is primarily a disease of infancy and early childhood.

Mr. Lyon: That is all.

Redirect Examination

By Mr. Tolin:

Q. Does a cold quartz light, emitting 2537 or 2540 angstrom units, cause pigmentation or tanning?

A. Practically no tanning that I have ever observed from it.

Q. Tanning is pigmentation, is it not?

A. Yes, a development of pigmentation in the skin.

Q. Then would you say that frequent use of a cold quartz light of the type that is before the Commission would not produce such tanning as would diminish the ability of the body to absorb further ultra-violet rays?

A. Well, in my opinion, it would not produce tanning of a degree that would prevent the con-

(Testimony of Dr. Roger W. Truesdail.)

tinued utilization of ultra-violet light in forming vitamin D.

Mr. Tolin: That is all. Thank you. [288]

MRS. LOIS FORD

was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Tolin:

Q. Will you state your full name, please?

A. Mrs. Lois Ford.

Q. What is your occupation?

A. I am a housewife.

Q. Where do you reside? [301]

A. 1556 North Mariposa in Hollywood.

Q. I show you Commission's Exhibit 9, and ask you if you recognize among the pictures on that exhibit any ultra-violet device with which you are acquainted. A. This one here (indicating).

Mr. Tolin: The witness indicates Model DL, as it appears upon Commission's Exhibit 9.

By Mr. Tolin:

Q. Now, where did you see a device like that pictured on Exhibit 9, which you have just referred to? A. We have one in our home.

Q. When did you acquire it?

A. Well, it was one of the first ones. I think

(Testimony of Mrs. Lois Ford.)

it must have been around 1932 or '33, along in the beginning.

Q. Where did you get it?

A. My husband brought it home. He got it from Mr. Warren.

Q. Does it have any trade name, that you know of?

A. I think there is. It seemed to me like it was "Ultra-Violet Light". I can't remember about that.

Q. Well, do you recognize it as the device that is sold under the trade name of Life Lite?

A. I think so.

Q. Now, have you used that light in your home during the time you have had it?

A. Yes, we have. [302]

Q. Who has used it besides yourself?

A. My husband uses it, and my son has used it, and we have had friends use it, borrow it and use it.

Q. In using it have you used goggles?

A. Yes, we have occasionally; not often. We often were careful about it. We would close our eyes or use it on other parts of the body. It wouldn't necessarily be the face.

Q. Have you used goggles on every occasion that you have used it about the face?

A. No, I think not.

Q. Well, have you ever experienced any burning of the eyes? A. No.

Q. Have you ever been burned about the body?

A. No.

(Testimony of Mrs. Lois Ford.)

Q. For what purpose have you used the light?

A. For colds, when we have colds, and often when—if anyone has a cold in the room, we pass it over the bedding and the pillows, and then we have used it for poison-oak, curing poison oak.

[303]

Cross Examination

By Mr. Lyon:

Q. How often did you use this lamp, Mrs. Ford?

A. Oh, often, during the years. We used it in the winter more than in the summer, of course, because there isn't as much sunshine.

Q. How often during the winter?

A. Oh, occasionally. I don't know. We used it as a health light. I don't think every day, but maybe once a week, maybe not as often as that.

Q. Not any oftener than once a week during the winter? A. I wouldn't think so.

Q. How often in the summer?

A. We don't use it in the summer, except when my son or when we get poison-oak. My boy has a tendency to get poison-oak and we used it to cure poison-oak.

Mr. Lyon: I object to the last portion of the answer.

Trial Examiner Reardon: The statement "to cure poison-ivy or a statement to that effect may be stricken. In other words, you used it, and after you used it you may have observed that the condition disappeared that you used [304] it for.

The Witness: That is right.

(Testimony of Mrs. Lois Ford.)

By Mr. Lyon:

Q. You said you have used it for colds, Mrs. Ford. Did you use it to prevent colds or after you had acquired a cold?

A. No, we used it over our bodies in the winter as a sort of vitamin source.

Q. You mean to prevent colds? A. Yes.

Q. And have you had any colds during the winter? A. Oh, yes, we have colds.

Q. You would get those colds even though you used the lamp once a week during the winter?

A. Yes, we have colds.

Q. Did you use the lamp after you had acquired the cold? A. Yes, we have.

Q. Did you keep on using it? A. Yes.

Q. Did you have any medical treatment during those periods? A. Oh, yes.

Q. You went to a doctor for the cold, did you?

A. That is right.

Q. And he gave you remedies and treatments for the cold? A. Yes.

Q. They usually disappeared after a short time, did they? [305]

A. Yes. We often use it though when we don't take medical treatment.

Q. You say it didn't prevent your getting colds?

A. No.

Q. You still get them. Would that be true, so far as the rest of your family is concerned, as well as yourself? A. Oh, I think so.

(Testimony of Mrs. Lois Ford.)

Q. The whole family would get colds from time to time? A. Yes.

Q. Would they all be using the lamp at various times? A. Yes.

Q. Not more than once a week at any time?

A. Well, it depends. It might have been two or three times a week and then we would go for a long time and not use it; for a month, maybe not use it.

[306]

CERTIFICATE

This is to certify that the attached proceedings before the Federal Trade Commission in the matter of: Docket No.—4407. Case Title—Ultra-Violet Products, Inc., a corporation. Place—Los Angeles, California. Date—May 29, 1941, were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

ETHEL E. FISHER & ASSOCI-
ATES, INC.,

Official Reporters.

By D. MacMILLAN,

Assistant Secretary.

DR. PHILIP A. LEIGHTON

was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Tolin:

Q. Please state your full name.

A. Philip A. Leighton.

Q. Where do you reside?

A. In Palo Alto, California.

Q. What is your vocation?

A. I am a chemist.

Q. Are you connected at the present time with any institution? [349]

A. Stanford University.

Q. What is your position there?

A. I am Professor of Chemistry and executive head of the Department of Chemistry.

Q. Where did you take your academic work in chemistry?

A. At Pomona College in California and at Harvard University.

Q. Did you take a degree at Pomona College?

A. I took a Bachelor's Degree and a Master's Degree at Pomona College.

Q. What degree did you take at Harvard?

A. I took two degrees; a Master's degree and a Doctor's degree at Harvard.

Q. What was the Doctor's degree?

A. Doctor of Philosophy.

Q. Did you also study in some other institutions of learning?

(Testimony of Dr. Philip A. Leighton.)

A. Yes. I have studied at the University of Munich, at Johns Hopkins University, at Cambridge University in England, and at the Imperial College of Science in London.

Q. Where have you taught?

A. I have taught at Harvard University and at Stanford.

Q. Have you done any writing in the field of ultra-violet radiation? A. Yes.

Q. Can you refer us to some of your work in that field?

A. Well, I published a paper on the Characteristics of [350] the Mercury Vapor Arc back in 1926, in the Journal of the Optical Society of America; two papers on Heterochromatic Photometry in the Ultra-Violet, in the Journal of the Optical Society of America in 1930 and 1931; one paper on Spectral Fluorescence Sufficiencies in the Ultra-Violet in the Physical Review in 1932; one paper on the Use of Thermopiles for the Measure of Radiant Energy in the Journal of Physical Chemistry in 1933; three papers on the Photochemistry of Aldehydes in the Journal of the American Chemical Society in 1932 to 1935; one paper on A Recording Microphotometry in the Review of Scientific Instruments in 1935.

Q. Can you tell us in which of the institutions of learning to which you have made reference, you have made any study of ultra-violet light?

A. At Harvard University and at Stanford.

(Testimony of Dr. Philip A. Leighton.)

Q. Have your studies in the other universities to which you have referred been in the field of chemistry or physics? A. Physical chemistry.

Q. What did you teach at Harvard?

A. I taught quantitative analysis at Harvard.

Q. What has been your special field of research and study?

A. Well, I am primarily a physical chemist and my special field of interest has been photochemistry.

Q. What is the definition of "photochemistry"?
[351]

A. Photochemistry is the study of the chemical effects of light.

Q. Does that include the invisible rays, such as ultra-violet, infra-red, and so on? A. Yes.

Q. How long have you been engaged in the special field of photochemistry?

A. Eighteen years.

Q. In the course of that study, have you had occasion to investigate the various effects of ultra-violet light of 2537 angstrom units? A. Yes.

Q. Have you also studied the effects of ultra-violet light of other angstrom units? A. Yes.

Q. Is there any appreciable difference between ultra-violet light of 2537 angstrom units and ultra-violet light of 2540 angstrom units? A. No.

Q. In the course of your study of ultra-violet light, have you studied it with respect to its effect upon the human being, that is, as to its penetration of the skin, and so on?

(Testimony of Dr. Philip A. Leighton.)

A. Have I studied it personally?

Q. Yes. [352]

A. No, I have not studied it personally.

Q. You have handed me here this morning, Doctor, a chart which I will ask be marked, for identification, as Respondent's Exhibit 2, and ask you what that chart represents?

(The document referred to was marked Respondent's Exhibit 2" for identification.)

A. That represents the so-called absorption curves of various layers of the skin, and also the absorption curve of the substance, ergosterol, as a function of wave length in the ultra-violet.

Q. Whose chart is that? That is, whose work is represented in it?

A. The measurements of the absorption of the skin layers were performed by Bachem, and the absorption curve for ergosterol was obtained by Angus.

Q. Do you know whether this chart is a representation of the recognized research in the subjects there reflected?

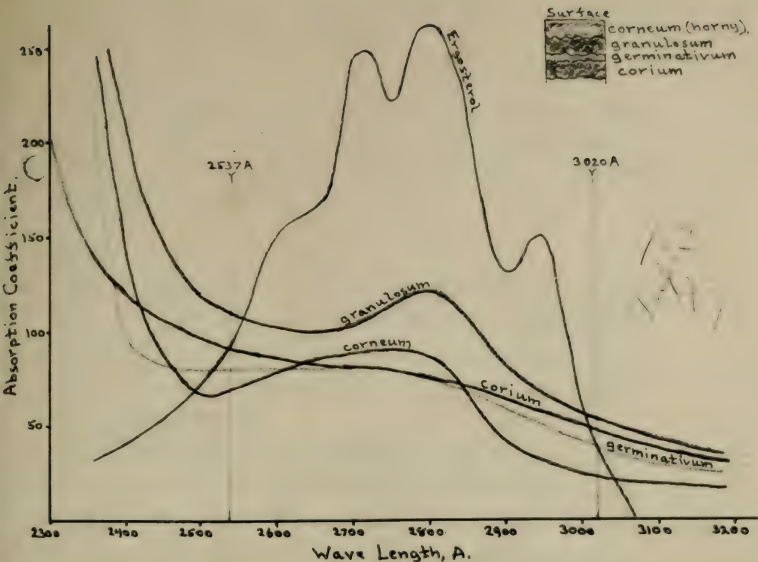
A. Yes. The work of Bachem is recognized to be the best which has been performed on skin transmission. The absorption of ergosterol has been measured by several investigators, without greatly different results.

Q. Along the left hand side of this chart there is the line which marks the boundary of the chart, and the various figures, and the wording, "absorption coefficient"? A. Yes. [353]

(Testimony of Dr. Philip A. Leighton.)

Mr. Lyon: Just a minute. Before we start talking about the exhibit, I think it would be proper to offer it in evidence first and find out if it is admissible in evidence in this case. [354]

(The document heretofore marked "Respondent's Exhibit 2" for identification, was received in evidence.)



Absorption by Skin Layers and by Ergosterol

References: Bachem, Am. J. Physiol., 91, 58 (1929).

Angus, Proc. Roy. Soc. London, 108B, 340 (1931).

Note that at 2537 Å and 3020 Å the different skin layers absorb in the same order; viz. granulosum (most), corium, germinativum, and corneum (least).

Note also that absorption by both corneum and granulosum is less at 2537 Å than at 2800 Å. In other words, 2537 Å is actually more penetrating than 2800 Å.

Comparing skin absorption with that of ergosterol shows why around 2950 Å is most efficient for producing vitamin D. The absorption of the corneum is low in this region, while that of ergosterol shows a peak. The efficiency of vitamin D production should not be greatly different at 2537 Å from that at 3020 Å.

FEDERAL TRADE COMMISSION

Docket No. 4407

RESPONDENT'S EXHIBIT No. 2

IN THE MATTER OF

Ultra-Violet Product

DATE

July

WITNESS Lighter

REPORTER

Yellow

EMIL E. FISHER & ASSOCIATES, INC.

(Testimony of Dr. Philip A. Leighton.)

Trial Examiner Reardon: I will let the Commission finally rule on this thing by granting the motion to strike which Mr. Lyon will probably make when you finish.

By Mr. Tolin:

Q. I have referred to this left side of your chart here, the part that bears the legend, "Absorption Coefficient", and ask you what is meant by that, and what these figures along that left hand side of the chart mean.

A. The absorption coefficient refers to a term in an equation, a well known equation, which relates the amount of absorption to thickness of layer of any given substance, and the amount of absorption in that equation—the numerical coefficient which expresses that relation is called the absorption coefficient.

Do you wish the equation? [355]

Q. No. Now, in the chart there is one line which is marked 2537-A. What does that mean?

A. That means 2537 angstroms.

Q. There appears to be another line marked 3020-A. What does that mean?

A. 3020 angstroms.

Q. Then there appear to be various colored lines extending across the chart, and one of them is marked "Ergosterol".

A. Yes.

Q. What is the significance of that line?

(Testimony of Dr. Philip A. Leighton.)

A. That is the curve showing the absorption coefficient of ergosterol as a function of wave length.

Q. There is another line there marked "granulosum". What is the significance of that?

A. That is a curve showing the absorption coefficient of the granulosum layer of the skin as a function of wave length.

Q. There is another line marked "corneum". What is the significance of that line?

A. That is a curve showing the absorption coefficient of the corneum layer of the skin as a function of wave length.

Q. There is another line marked, "corium". What is the meaning of that?

A. That is a curve showing the absorption coefficient of the corium layer of the skin as a function of wave length.

Q. There is another line marked, "germinativum." What is [356] the meaning of that?

A. That is a line showing the absorption coefficient of the germinativum layer of the skin as a function of wave length.

Q. Now, can you tell us, Doctor, from your research and study of ultra-violet light, approximately what the effect of that light is, so far as absorption at 2537 angstrom units is concerned?

A. I don't believe I quite understand what you want.

(Testimony of Dr. Philip A. Leighton.)

Q. Well, I will go back here where I have some notes. A. All right.

Q. I will for the time being leave that chart and proceed to another, which I will ask the reporter to mark as Respondent's Exhibit next in order.

(The document referred to was marked "Respondent's Exhibit 3", for identification.)

By Mr. Tolin:

Q. I now ask you what Respondent's Exhibit 3, for identification, is?

A. That is a chart showing the relative efficiencies of different wave lengths in the ultra-violet and the production of erythema, vesiculation of paramecia and bactericidal action.

Q. There appears at the left hand side of this chart a reference from 20 to 100, "relative efficiency." What is the [357] meaning of that?

A. That means the relative lengths of time—the reciprocal of the lengths of time required to produce the same effect at different wave lengths, with the same intensity of the different wave lengths.

Q. At the bottom of the chart there is a line indicating the bottom of the chart, and then various figures, 2300, 2400, 2500 and so on, the last one being 3200. What does that line and those figures represent?

A. Those figures represent wave lengths and angstrom units.

(Testimony of Dr. Philip A. Leighton.)

Q. Of what?

A. Of radiant energy of light.

Q. Do they represent the wave lengths of ultra-violet light? A. Yes.

Q. There appears a line in the chart that is marked, 2537-A. Does that refer to 2537 angstrom units? A. Yes.

Q. Whose work is this chart?

A. The work on the vesiculation is my own, with Professor Giese of Stanford University as a collaborator. The work on erythema is that of Luckiech, Holladay and Taylor. The measurment of bactericidal action is that of Gates.

Q. Is the work, other than that on vesiculation, accepted as standard and fixed observation and knowledge within the field of photochemistry? [358]

A. Yes.

Q. Referring to the work that is represented by Respondent's Exhibit 2, the first chart that I showed you, is the work that is reflected in that chart accepted as standard common knowledge of those subjects in the field of photochemistry?

A. Yes.

Trial Examiner Reardon: Just a minute. Does that include his own work on that chart, as well as those other gentlemen who are not present, that it is accepted?

By Mr. Tolin:

Q. Can you answer that?

A. Yes, I think so.

(Testimony of Dr. Philip A. Leighton.)

Mr. Lyon: You are talking now about Chart No. 1 or Chart No. 2?

Trial Examiner Reardon: No. 2.

By Mr. Tolin:

Q. Now, Doctor, on Respondent's Exhibit 3 there is an erythema line. A. Yes.

Q. And a bactericidal line and a vesiculation line. A. Yes.

Q. Tell us what is meant by this bactericidal line.

A. That shows the relative efficiency of these different wave lengths in reducing the rate of multiplication or division of bacteria. [359]

Q. What is the meaning of the erythema line?

A. That shows the relative efficiency of these different wave lengths in producing the phenomenon of erythema in the skin.

Q. The skin of what? A. Human beings.

Q. What is the meaning of the vesiculation line?

A. That shows the relative efficiency of different wave lengths in producing vesiculation of paramecia.

Q. What is meant by "vesiculation"?

A. Vesiculation is one of the most definite criteria of death in a single cell or in a single celled organ. The cell wall breaks and the protoplasm exudes through the breaks. It can be observed under a microscope. It happens rather quickly, and in the case of these experiments was taken as a criterion of the death of the animal.

(Testimony of Dr. Philip A. Leighton.)

Q. Why were tests of that kind made upon paramecia in order to determine the efficiency of ultra-violet light?

A. Paramecia are a small single celled organism which grow commonly in pond water, and they are particularly favorable organisms for experiments of this kind, because they can be cultured in strains in which the paramecia are all very much alike. They are pure culture, so that the individual effects between different organisms can largely be cancelled out and the true effects of the radiant energy determined. [360]

Q. Is the use of paramecia a generally accepted use in photochemistry for experimentation of that kind? A. Yes.

Q. Is it generally understood that that forms a comparative basis for the computation of those effects upon human cells?

A. Yes. The pseudoplasm and the nuclear protein in the paramecia appears to be not greatly different from that in the cells of the human body.

Q. Now, will you explain Respondent's Exhibit 3, being this second of the charts which I have shown you?

A. If you take the vesiculation curve first, that shows a very low efficiency above 3,000 angstroms. The efficiency increases rapidly below 3,000, reaches a maximum between 2800 and 2900 angstroms, and then drops off slowly at wave lengths below 2800 angstroms.

(Testimony of Dr. Philip A. Leighton.)

The erythema curve begins between 3100 and 3200 angstroms, rises rapidly to a maximum just below 3000 angstroms, drops rapidly to a minimum about 2800 angstroms, and then rises very gradually to another maximum below 2400 angstroms.

The curve of bactericidal action begins at about 3100 angstroms, rises gradually to a maximum about 2700, drops to a minimum about 2400 and rises again down to the limits of which the measurements were made.

Q. Do you know what is commonly known as a sun lamp? Do you know what it is? [361]

A. Yes.

Q. What is a sun lamp?

A. There are different types of sun lamps. Generally, a sun lamp is one which is presumed to reproduce the solar spectrum, the spectrum of the sun.

Q. What is the solar spectrum with respect to ultra-violet light?

A. With respect to ultra-violet light, the solar spectrum decreases rapidly in intensity as one goes towards shorter wave lengths, and the shortest wave length that is found—it depends, of course, on the time of day, and the time of year, and atmospheric conditions, but it is usually between 3000 and 2900 angstroms.

Q. Do you know whether ultra-violet light below 2900 angstroms has ever been observed as emanating from the sun?

A. Yes.

(Testimony of Dr. Philip A. Leighton.)

Q. How low in angstrom units has ultra-violet light been observed emanating from the sun?

A. I believe the lowest figure I have ever seen is 2875 angstroms.

Q. What is the difference, in so far as you can tell us from your studies, of the effect of ultra-violet light at 2537 angstroms and 2900?

A. On vesiculation?

Q. Yes. [362]

A. 2900 is more efficient than 2537.

Q. What would that mean in practical effect upon a subject exposed to the different lights—I should say “subjects”, I suppose, to the different lights?

A. The human subject?

Q. Yes.

A. Now, this vesiculation applies, of course, to paramercia, and in simple language it is effectively a measure of the efficiency of the different wave lengths in the coagulation of protoplasm. In the human subject the efficiency of these wave lengths of the coagulation of protoplasm in the living cells in the skin or in the subcutaneous tissue, for the light which reaches those cells, would not differ greatly from this, but the amount of light which reaches those cells, in turn, is governed by the transmission of the different layers of the skin, so that the result and effect would be made up of an efficiency curve for the light which reaches the living cells and the transmission curves of the different skin layers.

(Testimony of Dr. Philip A. Leighton.)

Q. What are the wave lengths of ultra-violet light that come from sun lamps?

A. No two sun lamps are alike, but, for the most part, the wave lengths are limited to longer than 2900 angstroms.

Q. How long a wave length would be used in a sun lamp,—I mean, would proceed from it?

[363]

A. They will extend up into the infra-red.

Q. Is there any similarity between the effect produced upon a subject exposed to ultra-violet light of 2537 angstrom units, and a subject exposed to ultra-violet light of a sun lamp? A. Yes.

Q. What is the comparison?

A. What is the similarity?

Q. Yes.

A. Both will produce erythema. Both will produce increased vitamin D activity, and both show a bactericidal and a vesiculation action.

Q. What is the comparison between vesiculation action in the use of the sun lamp and vesiculation action in the use of the light from the lamp that emanates a ray of 2537 angstrom units? That is, how do they compare?

A. Once again I must say that no two sun lamps are alike, but, in general, the vesiculation action for 2537 would be greater than that for a sun lamp.

Q. Do you mean to say there would be more vesiculation at 2537 than in the sun lamp?

A. Yes, because most sun lamps of the mercury

(Testimony of Dr. Philip A. Leighton.)

vapor type, the strongest—the greatest intensity in the ultra-violet region which has any effectiveness at all lies above 3000 angstroms, and the efficiency of these different effects for [364] that wave length above 3000 angstroms is small.

Q. What is the difference between the erythema producing power of a sun lamp at, say, 3100—that is a sun lamp length, is it not?

A. 3020 is the line, I would say, that is most characteristic.

Q. Well, let us say between 3020 and 2537?

A. Very nearly the same. 2537 perhaps a little more efficient than 3020.

Q. What is the difference between the bactericidal action of a lamp emitting 3200 angstroms, and one at 2537?

A. You mean 3020 angstroms?

Q. Yes.

A. That at 2537 is much higher.

Q. In a practical way, what would be the difference in its effect upon a human subject of ultra-violet light of the ordinary sun lamp and ultra-violet light from a lamp that emits 2537 angstroms?

A. In a practical way, the chief effect that one would obtain from the ordinary sun lamp would be a coat of tan, and the chief effects one would obtain from the light of 2537 angstroms would be an increased vitamin D activity, erythema and bactericidal action.

Q. Would there be greater bactericidal action

(Testimony of Dr. Philip A. Leighton.)

in a ray of 2537 angstrom units than in a ray of the type that would [365] come from a sun lamp?

A. Yes.

Q. Would there be greater erythema produced at 2537 than from the sun lamp ray?

A. Approximately the same.

Q. Would there be greater vesiculation produced at 2537 than from the sun lamp?

A. Yes.

Q. Now, you have referred to vesiculation as evidence of death of a cell. What would that mean with respect to producing vesiculation in the human being from exposure to 2537 angstrom units of ultra-violet light?

A. That would essentially mean a coagulation of protoplasm in the living cells.

Q. How would I feel if I were to turn such a ray upon myself?

A. It would blister.

Q. The vesiculation from the standpoint of a human being means the ability of the particular lamp used to produce a blister?

A. That would be one way of measuring it.

Q. What would be the vesiculation time of 2537 angstrom units coming from cold quartz held at one inch over the skin, moving about constantly?

A. You mean of the Life Lite type? [366]

Q. Yes.

A. Well over one hour.

Q. If the light were held at a distance of 30 inches from the subject, what would be the vesicula-

(Testimony of Dr. Philip A. Leighton.)

tion time of 2537 angstrom units, and held constantly, that is, not moved about?

A. Thirty inches?

Q. Yes.

A. That would be several hours.

Q. What would be the vesiculation time upon a human being of ultra-violet light, 2537 angstrom units, coming from cold quartz, such as the Life Lite, at 24 inches? A. Twenty-four inches?

Q. Yes.

A. That would also be several hours.

Q. Do you know from your own observation what the Life Lite is? A. Yes.

Q. Have you used a Life Lite? A. Yes.

Q. Have you used it in your studies?

A. Yes.

Q. What is the Life Lite?

A. Life Lite is a quartz tube, containing an inert gas at low pressure, plus a small amount of mercury. An electric [367] discharge is passed between two metallic electrodes at the end of this tube, and under those conditions of presence of an inert gas at low pressure, the radiation which is produced lies mostly at 2537 angstroms, which is one of the wave lengths emitted by mercury.

Q. What would you say would be the effect of taking an ultra-violet light of the hand type Life Lite, and turning it on for one minute, holding the lamp about one-half inch from the skin, passing the lamp over the chest and stomach, distributing the light over the chest and stomach for two minutes?

(Testimony of Dr. Philip A. Leighton.)

Do you think that would be a sufficient effect to produce vesiculation? A. No.

Q. Would it be sufficient to produce erythema?

A. Slight.

Q. Would it be sufficient to result in bactericidal action? A. Yes.

Q. Would it be sufficient to activate vitamin D?

A. Yes.

Q. Would your answer be any different if I were to change that from a two minute exposure to a three minute treatment?

A. Well, you would get more erythema, more vitamin D activity, more bactericidal action, but you still would not get vesiculation.

Q. Would your answer be any different, if I were to change [368] the exposure time to six minutes? A. No.

Q. Would there not be increased vitamin D activation? A. Yes.

Q. When you say your answer would not be any different, you mean there would be an increase in erythema, vitamin D activation, bactericidal action, but no different answer so far as vesiculation is concerned? A. That is right.

Q. Would that also be true as to a seven minute exposure? A. Yes. [369]

Mr. Tolin: I am not sure if Respondent's Exhibit 3 has been offered in evidence.

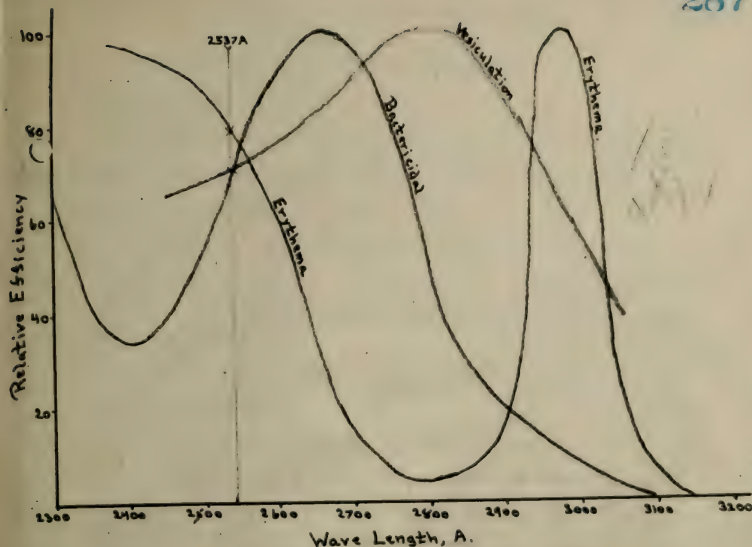
Trial Examiner Reardon: I have no record of its being offered.

Mr. Tolin: I offer it in evidence at this time.

(Testimony of Dr. Philip A. Leighton.)

Mr. Lyon: I renew my objection to that exhibit, as well as the previous one, for the reason indicated, as being hearsay. [373]

(The document heretofore marked "Respondent's Exhibit 3", for identification, was received in evidence.)



Relative Efficiencies as a Function of Wave Length for
Erythema Production, Vesiculation of Paramecia, and Bacteriocidal Action.

References: Erythema: Luckiesh, Holladay, and Taylor, J. Opt. Soc. Am.,
 20, 423 (1930).

Bacteriocidal: Gates, J. Gen. Physiol., 14, 31 (1930).

Vesiculation: Giese and Leighton, J. Gen. Physiol., 18, 557 (1935).

FEDERAL TRADE COMMISSION

Exhibit's 4407 ~~and~~ 3
 IN THE MATTER OF Ultra-Violet Products
 DATE 5/24/41 WITNESS Leighton
 REPORTER J. Fisher
 RUTH E. FISHER & ASSOCIATES, INC.

(Testimony of Dr. Philip A. Leighton.)

By Mr. Tolin:

Q. Have you yourself studied wave lengths in ultra-violet radiation between 3000 angstroms and 2540 angstroms? A. Yes.

Q. In your own studies of those wave lengths, is there any specific difference in the radiations around 3000 angstroms and the radiations around 2540 angstroms?

A. No. There are relative differences, but no specific differences.

Q. What are the relative differences?

A. The relative differences are that certain wave lengths will be more effective—more efficient for one thing, and other wave lengths will be more efficient for another.

Q. Now, how is that shown on the chart, taking the curve of [374] ergosterol and bactericidal action, and so on?

A. That is shown on the basis of these curves of relative efficiencies against wave lengths.

Q. Can you show on the chart the absorption curve of the skin for 2540 angstroms and 3020 angstroms, and state if there is any reason why one might be more effective than the other, and state the nature of it, considering exposure time in that answer?

A. The absorptions of the different layers of the skin come in the same order at 2537 angstroms as at 3020 angstroms. The most strongly absorbing layer is the granulosum, the next is the corium, the next is the germinativum, and the least strongly

(Testimony of Dr. Philip A. Leighton.)

absorbing layer of these two wave lengths is the corneum. On that basis there is no distinction to be made between these two wave lengths. [375]

Q. Does ultra-violet light of 2537 angstroms, such as comes from the respondent's product, Life Lite, produce vitamin D activation? A. Yes.

Q. What is vitamin D activation?

A. That is a name applied to an increased anti-rachitic activity in the body or in animals.

Q. Does that include some influence on calcium and phosphorus in the blood of the animal? [379]

A. Yes. The calcium phosphorous metabolism is influenced by a change in vitamin D activity.

Q. Does that increase in calcium phosphorous metabolism affect the body chemistry?

A. Yes.

Q. Then would you say that ultra-violet light, such as emanates from the respondent's product, does have an effect upon body chemistry?

A. Yes.

Q. And that effect is what?

A. Well, through the increased vitamin D activity and its influence on the calcium phosphorous metabolism, the one chemical effect—erythema, of course, is simply a chemical effect in the body. Vesiculation also is a chemical effect.

Q. It is true, though, is it not, that the wave length, 2540 angstroms, is more efficient in producing erythema than the wave length at 3000 angstroms?

(Testimony of Dr. Philip A. Leighton.)

Mr. Lyon: I object to that question as leading the witness. I think the question should be re-phrased.

Trial Examiner Reardon: I will sustain the objection.

By Mr. Tolin:

Q. What is the comparative efficiency of 2540 angstroms and 3000 angstroms, as to erythema production?

A. Very nearly the same. [380]

Q. What is the comparative efficiency of the wave lengths, 2540 angstroms and 3000 angstroms, in vitamin D activation?

A. That is not definitely known. It has been established that all wave lengths through this region produce vitamin D, but, to my knowledge, a good relative efficiency curve has not yet been established for vitamin D production.

Q. Is there a harsh effect produced by wave lengths below 2800 angstroms that does not result from wave lengths that are longer? A. No.

Q. The answer is "no"?

A. That is right.

Q. Will you explain then how it can be that a person might produce an erythema with respondent's product within a short exposure, but that it would require a considerably longer exposure to obtain a like erythema from exposure to the sun?

A. The intensity in respondent's product, the intensity reaching the skin when the lamp is held close up is much greater than the intensity of the

(Testimony of Dr. Philip A. Leighton.)

wave lengths in this region reaching the skin from the sun.

Q. Are the results from a short exposure with a Life Lite, an exposure sufficient to produce erythema, bactericidal action, vitamin D activation, any different from exposure to the sun for a long enough period of time to produce light [381] erythema, and bactericidal action, and vitamin D activation?

A. I would say that the amount of vitamin D activation would be about the same for the same erythema production. The amount of bactericidal action would be greater for the respondent's product than for the sun.

Q. What about vesiculation?

A. Vesiculation without tremendous over-exposure would be negative in either case.

Q. Do you recognize any distinction between a therapeutic lamp and a sun lamp? Do you know of a classification of one type of these ultra-violet lights known as a therapeutic [382] lamp and another as a sun lamp?

A. The classification that I have seen used has a division as between wave lengths. A sun lamp emits no wave lengths—no radiation of wave lengths shorter than those found in the sun light. A therapeutic lamp does.

Q. Is a cold quartz light, of the type that respondent manufactures considered a therapeutic lamp? A. On that basis, yes.

Q. Is there any basis for a statement that the rays emitted from a therapeutic lamp possess bac-

(Testimony of Dr. Philip A. Leighton.)

tericidal properties that are not comparable to the rays emitted by natural sun light? A. No.

Q. Is that answer based upon your own knowledge or are you quoting from the work of someone else?

A. If you refer only to bactericidal action?

Q. Yes.

A. That is quoting from the work of other people.

Q. Is that general knowledge within the science of body chemistry?

A. That is general knowledge.

Trial Examiner Reardon: Is it based upon the work of other people, rather than quoting from them? He has spoken of his own knowledge, and his knowledge extends beyond the knowledge that he has from the work that he has [383] done through the literature, but you can let it go on that.

By Mr. Tolin:

Q. Do you appreciate that distinction, Doctor? Of course, we know of our own knowledge a lot of things that are not the results of our own individual research——

A. Yes.

Q. ——but which are accepted knowledge, according to the understanding which we have of a given subject. A. That is right.

Q. Now, can you tell us whether your answer was based upon your own knowledge or not?

A. It was based on my own knowledge, but not on my own work.

(Testimony of Dr. Philip A. Leighton.)

Q. Are therapeutic lamps not suitable for the same types of uses as sun lamps? A. No.

Q. That question is rather badly worded. I should say: Are therapeutic lamps suitable for the same types of uses as sun lamps? A. Yes.

Q. Is that answer based upon your own knowledge?

A. Yes. With one exception perhaps, the sun lamp is better for producing a coat of tan.

Q. Is that the only distinction between the therapeutic lamp and the sun lamp?

A. To my knowledge, that is the only distinction. [384]

Q. Isn't there also the distinction that with the sun lamp it is necessary to use it longer in order to obtain a result that could be obtained with a therapeutic lamp with a shorter exposure?

A. That, of course, depends upon the intensity of the sun lamp, as compared to the cold quartz lamp, and the distance which the two are maintained from the body. [385]

Q. Is it true that the respondent's device will not give benefits to the skin and the general health that are given by natural sun light?

A. Based on the best established evidence which is available, the answer is no.

Q. Are the ultra-violet rays emitted from respondent's device comparable to the ultra-violet rays emitted from natural sunlight?

A. Comparable, yes.

Q. Are such ultra-violet rays identical to those

(Testimony of Dr. Philip A. Leighton.)

that are emitted from natural sunlight, except as to wave length?

A. Well, I can't say yes or no to that question. They differ in wave lengths, and they differ in their frequency, and they differ in their relative effects. They don't differ, so far as I know, in any specific effects.

Q. Would you say that ultra-violet rays emitted from respondent's product are comparable to the ultra-violet rays [388] emitted by natural sunlight?

A. Yes.

Q. As to specific effects that are known, is there any distinction in such specific effects upon the human being?

A. No, I know of no effect that is produced by the ultra-violet in sunlight that is not also produced by 2537 angstroms.

Q. Are there any effects that are produced by 2537 angstroms that are not produced by natural sunlight?

A. No, not that I know of.

Q. Are there any effects that are produced by 2537 or 2540 angstrom units, that are not produced by 3100 angstrom units?

A. Possibly bactericidal action.

Q. In what way is bactericidal action possibly different?

A. That the efficiency at 3100 angstroms is very low for bactericidal action.

Q. Have you completed your research and study of ultra-violet light?

A. No.

(Testimony of Dr. Philip A. Leighton.)

Q. How recently have you devoted any time to that study?

A. Oh, within the past week.

Q. Is that a subject of continued research in your department at Stanford University?

A. Yes.

Q. Is the information which you have given us here the latest available information upon the subject? [389]

A. Yes.

Q. Do you keep up with the subject, as it is studied in places other than Stanford University?

A. I try to.

Q. Aren't you at the present time co-authoring a book upon this subject with a professor from another university?

A. Yes.

Q. What is that work?

A. It is a book entitled, "The Photochemistry of Gases," to be published under the auspices of the American Chemical Society.

Q. Who is the co-author?

A. Professor W. A. Noyes, Jr., the executive head of the department of chemistry at the University of Rochester.

Q. Has that book actually been published?

A. Not yet.

Q. Is it in process of publication, or are you preparing it for publication?

A. It is in process. It should appear within the next two or three months.

Q. How long a book is that? Is it a pamphlet or a full length book?

(Testimony of Dr. Philip A. Leighton.)

A. It is about 465 pages, I believe.

Q. Do you teach a class in photochemistry?

A. Yes. [390]

Q. Does that include the study of ultra-violet light?

A. Yes. Most of it is concerned with ultra-violet light.

Q. Is there any other class in photochemistry at Harvard that is, other than the one taught by you?

A. You mean at Stanford?

Q. Pardon me. At Stanford?

A. Professor Giese teaches a course in photobiology, which overlaps to some extent with my course.

Q. Those are courses that supplement each other, are they? A. Yes.

Q. Doctor as to these two charts that I have introduced into evidence and have shown you here this morning, can you say whether those charts are considered basic in the field of photochemistry?

A. Yes, they are. The photochemist differs from the biologist or from many biologists, in that he wishes to express information, as far as possible, which is divorced from the physiological or biological effects; in other words, which is divorced as far as possible from the specific effects which arise from the fact that the organism is living. Among these effects which can be so divorced are absorption curves—with respect to radiation are absorption curves and efficiency curves for certain actions.

Q. Then would you say that the matter that is

(Testimony of Dr. Philip A. Leighton.)

represented in those charts, Respondent's Exhibits 2 and 3, are matters [391] within your own knowledge?

A. I would say that these are facts, not opinions.

Q. Are they accepted as such by photochemists in general? A. Yes.

Q. They are in your study as basic as the law of gravity is in the study of physics?

A. That is right.

Q. Is it possible to answer the question which I have propounded to you, about the use of cold quartz light and its effect and the use of lights of other wave lengths, without using the information that is reflected in the charts, Exhibits 2 and 3?

A. No.

Mr. Lyon: Meaning, so far as the present witness is concerned? Is that your question?

Mr. Tolin: No. So far as the question's being accepted upon a basis of scientific knowledge.

The Witness: I don't think anyone could answer those questions without having the knowledge which, as you say, is contained in these charts.

Trial Examiner Reardon: That still does not qualify those exhibits, because while he could not answer without the information he sees in those charts, counsel for the Commission contends the information in those charts, if admissible, should be put in in a way that would render [392] the evidence admissible. That is the reason I granted the motion to strike the exhibits and the testimony relating to them.

(Testimony of Dr. Philip A. Leighton.)

By Mr. Tolin:

Q. Well, Doctor, is that information which is reflected in the charts, Exhibits 2 and 3, information within your own knowledge? A. Yes.

Q. Then your answers here have been based upon your own knowledge, rather than upon the charts, as such?

Mr. Lyon: Just a minute. I think we are getting into the field of self-serving declarations. I think the facts speak for themselves. I object to that last question as argumentative and speculative.

Trial Examiner Reardon: I will sustain the objection. He did not prepare the charts, or the information in the charts was not prepared by him.

Mr. Tolin: He said that some of it was.

Trial Examiner Reardon: Yes. Some would not make the whole chart admissible. If it is inadmissible for one reason, it is inadmissible.

By Mr. Tolin:

Q. I will ask you, Doctor, if the two papers that are before you, Exhibits 2 and 3, were prepared by you? A. Yes. [393]

Q. From what were they prepared?

A. I took the information directly from the original papers and literature.

Q. What original papers and literature?

A. The papers that are referred to on these charts. I have one of them in my briefcase now.

Mr. Tolin: Yes. I will ask to have this marked for identification as the Respondent's exhibit next in order.

(Testimony of Dr. Philip A. Leighton.)

(The document referred to was marked "Respondent's Exhibit 4", for identification.)

By Mr. Tolin:

Q. I show you Respondent's Exhibit 4, for identification, which appears to be a chart in the Archives of Physical Therapy, and ask you if you recognize that as either being or not being one of the basis charts used in the subject?

Mr. Lyon: That is objected to. [394]

Mr. Tolin: I will put it in a different way, and ask him what that is.

Trial Examiner Reardon: That objection will be overruled at the present time. You may answer yes or no. I think that will answer it.

The Witness: That is——

Trial Examiner Reardon: You may answer yes or no, I think.

Mr. Tolin: He is allowing you to answer the first question.

The Witness: What was the first question?

Trial Examiner Reardon: Read it, please.

(The question referred to was read as follows:

"Q. I show you Respondent's Exhibit 4, for identification, which appears to be a chart in the Archives of Physical Therapy, and ask you if you recognize that as either being or not being one of the basic charts used in the subject?"')

The Witness: That is. I answer that: Yes, that is.

(Testimony of Dr. Philip A. Leighton.)

By Mr. Tolin:

Q. Will you explain this chart, Respondent's Exhibit 4, for identification?

Mr. Lyon: Just a minute. I object to all testimony with reference to this chart as not being proper testimony, and object to the chart itself as being hearsay. [395]

Mr. Tolin: I offer the chart in evidence as Respondent's Exhibit 4.

Trial Examiner Reardon: What is this thing you call the Archives of Physical Therapy, or, Physiotherapy, I guess it is.

The Witness: That is one of the recognized scientific journals.

Trial Examiner Reardon: It is a journal?

The Witness: It is a journal.

Mr. Tolin: Printed in that journal appears this chart by way of illustration of an article.

Trial Examiner Reardon: I will have to sustain the objection to the admission in evidence of the chart as Respondent's Exhibit 4.

Mr. Tolin: He has testified that it is one of the basic charts of that particular science. I am not offering the Journal of Physical Therapy, but simply that, in order to adduce the chart that I found printed in one of those Journals, just as effectively as if the witness had written it out.

Mr. Lyon: I object to counsel testifying.

Trial Examiner Reardon: Well, he isn't testifying. I will let my ruling stand on that.

(Testimony of Dr. Philip A. Leighton.)

Mr. Tolin: Very well. May this be marked Respondent's Exhibit 5, for identification? [396]

(The document referred to was marked "Respondent's Exhibit 5", for identification.)

By Mr. Tolin:

Q. I show you a piece of paper which is marked Respondent's Exhibit 5, for identification, and ask you whose writing appears upon that, if you know?

A. That is mine.

Q. What is that?

A. That is a reproduction of the best present established average values of transmission of radiation of different wave lengths by the different layers of the skin.

Q. From what did you prepare that?

A. From what?

Q. Yes.

A. I prepared that from a paper by Bachem and Reed in the American Journal of Physiology.

Q. Is Bachem and Reed's paper their report of opinion, or is that merely an assembling of the known facts in the science, as, for instance, in the science of mathematics, if I were to write a multiplication table, I would be assembling known facts?

A. That is a report of original work.

Q. Of Bachem and Reed?

A. Of Bachem and Reed.

Mr. Tolin: I offer it as Respondent's Exhibit 5. [397]

Mr. Lyon: I object to it as hearsay.

(Testimony of Dr. Philip A. Leighton.)

Trial Examiner Reardon: I sustain the objection. [398]

Mr. Lyon: At this time, if the Examiner please, I move to strike Respondent's Exhibits 2 and 3, and all testimony based thereon, as being hearsay and, furthermore, that all testimony with reference to the vesiculation experiments is not material or relevant to the issues in this case.

Trial Examiner Reardon: I will grant the motion to strike Respondent's Exhibits 2 and 3, and the testimony which is connected with those exhibits, directly connected with them. I will not strike the testimony relating to vesiculation. I will overrule the motion to that extent. [399]

Trial Examiner Reardon: I will let the ruling stand and exclude that exhibit, as has been my ruling, as a whole, and I will also include in the granting of the motion to strike the testimony of the witness on vesiculation, in so far as that testimony refers to Respondent's Exhibit 3. [401]

(A short recess was taken.)

By Mr. Tolin:

Q. Doctor, do you know what the absorption by skin layers and by ergosterol is of ultra-violet light of various wave lengths? A. Yes.

Q. Can you tell us what the absorption by ergosterol is between the wave lengths, approximately 2400 and approximately 3100?

A. It is relatively small at 2400, increases toward longer wave lengths, shows a double maximum in the region around 2700 or 2800, shows a smaller

(Testimony of Dr. Philip A. Leighton.)

maximum between 2900 and 3000, decreases to zero in the neighborhood of 3100.

Q. Can you tell us about what it is at 2537 angstroms? [402]

A. At 2537 it is approximately the same that it would be for 2900—or, approximately the same as it would be for 3000. The figures, I couldn't quote the exact figures at 2537.

Q. That is, 2537 and 3020 are approximately the same?

A. Approximately the same. It would be a little higher at 2537 than at 3020.

Q. What is corneum?

A. Corneum is the outer or horny layer of the skin. [403]

Q. Does corneum absorb ultra-violet?

A. Yes.

Q. How much ultra-violet light does corneum absorb between 2400 angstrom units of light and 3100 angstroms of light, or thereabouts?

A. Well——

Q. I mean, angstrom units of light.

A. Yes. Well, the absorption is quite low above 3100. Below 3100 it increases to a maximum at about 2800, drops to a minimum at about 2500, and then increases again quite rapidly below 2500.

Q. What is the comparative absorption of ultra-violet light by the corneum between 2537 angstroms and 3000 angstroms?

A. Slightly greater at 2537, but not markedly greater.

(Testimony of Dr. Philip A. Leighton.)

Q. What is granulosum?

A. Granulosum is the next layer underlying the corneum.

Q. Does granulosum absorb ultra-violet light?

A. Yes.

Q. Beginning at about 2400 angstroms and on up to about 3100 angstrom units, what is the absorption of ultra-violet light by granulosum?

A. Granulosum also absorbs strongly at 2400. The absorption decreases in the longer wave lengths to a minimum in the neighborhood of 2500. It increases to a maximum, not as pronounced I believe as the maximum for corneum, around 2800 [404] or 2900, and decreases again at longer wave lengths.

Q. What is the comparative absorption of ultra-violet light by granulosum at 2537 angstrom units and at 3000 angstrom units?

A. Slightly greater at 2537, but not markedly different.

Q. What is germinativum?

A. Germinativum is the germinative layer which lies directly under the granulosum.

Q. Does germinativum absorb ultra-violet light?

A. Yes.

Q. Beginning at approximately 2400 angstrom units of such light to 3200 angstrom units of such light, what is the germinativum absorption thereof?

A. It absorbs quite strongly at 2400, and the absorption decreases as one goes towards longer wave lengths.

(Testimony of Dr. Philip A. Leighton.)

Q. What is the comparative absorption of ultra-violet light by germinativum at 2537 angstrom units and at 3000 angstrom units?

A. Slighter greater at 2537.

Mr. Tolin: Will you read the answer, please?

(The answer referred to was read.)

By Mr. Tolin:

Q. What is corium? A. Corium——

Mr. Lyon: He has already answered that. Or, was [405] that corneum?

The Witness: Corneum.

Mr. Lyon: Corium is something else?

The Witness: Yes.

Mr. Lyon: All right.

The Witness: Corium is the layer underlying the germinativum. It is the layer which carries the maximum number of living cells, and also the layer in which the vitamin D activity is produced.

By Mr. Tolin:

Q. Does corium absorb ultra-violet light?

A. Yes.

Q. What is the absorption of ultra-violet light by corium between 2400 angstrom units of such light and 3200 units of such light?

A. It is quite high at 2400, drops to longer wave lengths; about 2500 it becomes very nearly constant for several hundred angstroms, then drops again at still longer wave lengths.

Q. What is the comparative absorption of ultra-violet light by corium as between angstrom units, 2537 and 3000?

(Testimony of Dr. Philip A. Leighton.)

A. It would be slightly greater at 2537.

Q. Now, in respect to their position in the skin is corneum the outside layer? A. Yes. [406]

Q. Have you testified as to the absorption of corneum, as it would absorb were the light applied to the corneum without having to penetrate some other substance? A. Yes.

Q. In your testimony as to the absorption of ultra-violet light by granulosum, have you testified there with consideration to the fact that the ultra-violet light would travel through some other substance before reaching granulosum? A. No.

Q. Haven't you contemplated that it would travel through corneum?

A. No. That is the absorption by granulosum itself.

Q. Is that true also as to germinativum?

A. Yes.

Q. And to corium? A. Yes.

Q. What is ergosterol?

A. Ergosterol is a member of a chemical family of substances known as sterols.

Q. Where is it found in the skin, if at all?

A. If at all, it is found chiefly in the corium layer.

Q. Is there any doubt as to whether it is found in the corium?

A. Well, there are several sterols found in the skin, and there is sometimes doubt as to which they might be. [407]

(Testimony of Dr. Philip A. Leighton.)

Q. What is the absorption by ergosterol of ultra-violet light?

A. I think I answered that.

Q. Yes, that is right. That was the first one I inquired about. Have you, of your own knowledge, tabulated the matter which you just testified to on paper? A. Yes.

Q. I show you now Respondent's Exhibit 2, and ask you if that is a tabulation of your own knowledge, by way of resume, of what you have testified to?

Mr. Lyon: Just a minute. He has already testified with reference to Respondent's Exhibit 2, as being a compilation of information from other sources. If counsel is trying to change his testimony in that regard, why, I think such a question would be inadmissible at this time.

Mr. Tolin: I am not trying to change his testimony. He has now added to it and if it answers——

Trial Examiner Reardon: I will overrule the objection. He may answer.

The Witness: Could I have the question again now?

(The question referred to was read.)

The Witness: Yes.

Mr. Tolin: I offer Respondent's Exhibit 2 in evidence.

Mr. Lyon: I object. [408]

Trial Examiner Reardon: I make the same ruling, and give you an exception.

(Testimony of Dr. Philip A. Leighton.)

By Mr. Tolin:

Q. Do you know the relative efficiency as a function of wave lengths of erythema production, vesiculation of paramecia, and bactericidal action—— A. Yes.

Q. ——of ultra-violet light? A. Yes.

Q. As to erythema production, will you tell us the relative efficiencies between 2400 angstrom units and 3200 angstrom units?

A. The efficiency is relatively high at 2400; with increasing wave lengths the efficiency drops to a minimum around 2700 angstroms. It rises to a sharp maximum between 2900 and 3000 angstroms, and drops rapidly above 3000 angstroms to zero at approximately 3100 angstroms.

Q. What is the comparative efficiency between 2537 angstrom units and 3100?

A. 2537 would be very much more efficient than 3100.

Q. Do you know the relative efficiencies as a function of wave lengths for vesiculation of paramecia?

Mr. Lyon: Just a minute. That is objected to as irrelevant to the issues in this case.

Trial Examiner Reardon: I will overrule the [409] objection.

The Witness: The answer is "yes."

By Mr. Tolin:

Q. What is it between 2400 angstrom units and 3200?

(Testimony of Dr. Philip A. Leighton.)

A. Beginning at 2400 and going to the longer wave lengths, the efficiency of vesiculation increases to a maximum around 2800 angstroms. It decreases at longer wave lengths.

Q. Between 2537 angstroms and 3000 angstroms, what is the comparative vesiculation power?

A. At 3000 the vesiculation power would be somewhat higher than at 2537, but not markedly different.

Q. Do you know the relative efficiencies as a function of wave lengths for bactericidal action of ultra-violet light? A. Yes.

Q. What is it as between 2400 angstroms, or, I will change that. What is it as between 2300 angstrom units and 3100 angstrom units? [410]

A. The efficiency, starting from the lower limit of observation of 2300 angstroms, the efficiency decreases at longer wave lengths to a minimum at about 2500 angstroms, increases to a maximum between 2600 and 2700 angstroms, then drops off in longer wave lengths and approaches zero at wave lengths around 3000 to 3100.

Q. What is the comparative efficiency of bactericidal action between 2537 angstroms and 3000?

A. It is considerably higher at 2537.

Q. Have you tabulated the results of your study as to these relative efficiencies and made, for your own convenience, a table showing them?

A. Yes.

Q. I show you Respondent's Exhibit 3, and ask you if you recognize that as the table to which you have referred?

(Testimony of Dr. Philip A. Leighton.)

Mr. Lyon: That is objected to.

Trial Examiner Reardon: Well, he can show him.

Mr. Lyon: All right.

(The document referred to was handed to the witness.)

The Witness: Yes, that is one which I prepared.

Mr. Tolin: I offer Respondent's Exhibit 3 in evidence.

Mr. Lyon: I object to it.

Trial Examiner Reardon: The objection is sustained.

Mr. Tolin: When the Examiner ruled upon Respondent's [411] Exhibit 6, this article, did you understand that the witness was a co-author of the article?

Trial Examiner Reardon: Yes.

Mr. Tolin: Very well. Then I will not re-offer it.

I am not sure whether the matter I am about to inquire into has been stricken or not, so as a matter of caution, I will ask him again.

By Mr. Tolin:

Q. Can you state whether there is any specific difference between radiation of ultra-violet light at either 2540 angstrom units or 3000 angstrom units, so far as results from these wave lengths are concerned? A. No specific differences.

Q. Is there any basis in fact for an assertion that wave lengths of ultra-violet light above 2800

(Testimony of Dr. Philip A. Leighton.)

angstrom units are drastically different in effects from wave lengths below 2800 angstrom units?

A. No.

Trial Examiner Reardon: What do you understand by "drastically"?

The Witness: Appreciably.

Trial Examiner Reardon: Appreciably?

The Witness: Markedly.

Trial Examiner Reardon: In other words, is there [412] any difference?

Mr. Tolin: I was going to ask that.

Trial Examiner Reardon: If you are going into it, all right.

By Mr. Tolin:

Q. Is there any basis in fact to assert that wave lengths of ultra-violet light above 2800 angstrom units are different in effects than wave lengths below 2800 angstrom units?

Mr. Lyon: That is objected to as being immaterial to the issues in this complaint.

Trial Examiner Reardon: Objection overruled. You may answer.

The Witness: There are relative differences between different wave lengths.

By Mr. Tolin:

Q. What are they?

A. The wave lengths around 2900 to 3000 angstroms and wave lengths around 2600 angstroms are the most efficient for producing erythema. The wave lengths around 2600 to 2700 angstroms are the most

(Testimony of Dr. Philip A. Leighton.)

efficient for producing bactericidal action. The wave lengths around 2800 are most efficient for producing vesiculation.

Q. What will determine the difference in result from irradiation of a human being with a wave length of ultra-violet light at about 2540 angstrom units and that at about [413] 3000?

A. First, the relative intensities of the two sources which are used; secondly the relative absorption of the different layers of the skin for these different wave lengths; third, the relative absorption of such substance as ergosterol absorption, which produces specific effects within the skin.

Mr. Tolin: You may cross examine. [414]

Cross Examination

By Mr. Lyon:

Q. How long have you been teaching at Stanford University, Doctor? A. Since 1928.

Q. What courses have you been teaching during that period?

A. I have been teaching general chemistry regularly, and photochemistry every second year, with an advanced course in atomic and molecular structure alternating with the photochemistry, and I have also taught courses in photography and advanced economic chemistry, and in chemical kinetics.

Q. You are at present head of the department of chemistry, are you? A. Yes.

Q. Have any of those courses dealt primarily with physiotherapy—— A. No. [415]

(Testimony of Dr. Philip A. Leighton.)

Q. —or ultra-violet therapy at all?

A. No.

Q. I believe you stated that that did come in incidentally in one of the courses; is that correct?

A. That is right.

Q. And what course was that?

A. Photochemistry.

Q. And you give that every second year?

A. That is right.

Q. Is that a lecture course, or——

A. That is a lecture course.

Q. Prior to coming to Stanford, you were at Harvard University, I understand. Is that correct?

A. Yes.

Q. What did you teach there?

A. I taught quantitative analysis there.

Q. You taught no course there dealing with ultra-violet therapy? A. No.

Q. What research, if any, have you done personally in connection with light therapy?

A. In connection with light therapy?

Q. Yes.

A. I have made an investigation of the relative efficiencies of different wave lengths on vesiculation, and also on the [416] immobilization of paramecia. I have made investigation of long wave length limits of photolethal action in the ultra-violet.

Q. Photolethal action? A. Photolethal.

Q. What do you mean by that?

(Testimony of Dr. Philip A. Leighton.)

A. The wave length limit which has the power to kill a cell, a living cell.

Q. When did you make that research?

A. That has all been made within the past ten years.

Q. And all at Stanford University?

A. All at Stanford.

Q. Now, as I understand it, those researches have dealt exclusively with the vesicular action and photolethal action of ultra-violet radiation; is that correct?

A. One part of our investigation was simply on the immobilization of those small organisms, paramecia, by light.

Q. And what do you mean by "immobilization"?

A. That is the loss of their power to propel themselves, to move.

Q. That is a branch of the photolethal action, would you say?

A. Yes.

Q. And also the vesicular action?

A. That is right. [417]

Q. It would all come generally under the head of vesiculation?

A. Under the head of photolethal action.

Q. Photolethal action. That is the general type?

A. Yes.

Q. I believe you stated that you had not studied or had any research particularly in ultra-violet radiation, so far as bactericidal action was concerned?

A. No, I have done none of that.

Q. You didn't go into that at all?

A. No.

(Testimony of Dr. Philip A. Leighton.)

Q. You didn't go into the research as to the penetration of the ultra-violet rays into the skin?

A. No, I have done none of that.

Q. Your testimony this morning along that line has been based upon your reading, has it?

A. Reading and discussions with other people in the field.

Q. And not upon any personal observation?

A. Not upon any personal research.

Q. Would that also be true so far as your testimony with reference to the production of erythema by ultra-violet radiation is concerned?

A. Not entirely. I have made some personal observations on that, although they have not been published.

Q. Just what was your research in reference to that? [418]

A. Well, of course, a part of my work is the use of various ultra-violet sources and studies of the effects of different wave lengths, and I have tried upon my own skin the effectiveness of different lines of—different radiations given out by the mercury arc.

Q. Now, what are the principal sources of ultra-violet radiation, Doctor?

A. The principal sources?

Q. Yes.

A. Well, I would say the quartz mercury arc is the most commonly used source. The carbon arc is also commonly used. The sun, of course, is one source of ultra-violet radiation, and various electric

(Testimony of Dr. Philip A. Leighton.)

sparks between metals are powerful in ultra-violet rays. Various discharges through gases other than mercury give ultra-violet rays.

Q. Would you say that the sun was the chief source of natural ultra-violet radiation?

A. I would say the sun is the only source of natural ultra-violet radiation.

Q. That is, other methods of producing ultra-violet radiation would be artificial; is that correct?

A. Yes.

Q. That is, the quartz mercury arc and the carbon arc and other methods?

A. Those are artificial sources. [419]

Q. Now, is there more than one kind of quartz mercury arc?

A. Yes. There are, I would say, probably a dozen different kinds.

Q. How are those classified?

A. Well, one could classify them according to whether they are low pressure or high pressure arcs, or as to whether they are direct current or alternating current arcs, or as to whether they are low temperature or high temperature arcs.

Q. Are you familiar with a distinction made between a hot quartz and a cold quartz—

A. Yes.

Q. —ultra-violet lamp? A. Yes.

Q. What is the basis of that classification?

A. That classification is based chiefly on the temperature which the arc obtains in operation.

(Testimony of Dr. Philip A. Leighton.)

Q. That is, the cold quartz is the low temperature? A. Yes.

Q. And the hot quartz is the high temperature? Is that correct? A. That is right.

Q. Now, for your information, Doctor, it has been testified that the lamp produced and sold by the respondent in this proceeding emits ultra-violet radiation of wave lengths, as follows: [420]

2540 angstrom units, 89.2 per cent; wave lengths of 2960 to 3020 angstrom units, .6 per cent; wave lengths of 3132 angstrom units, 1.8 per cent; wave lengths of 3660 angstrom units, 1.5 per cent; visible light and heat, 6.9 per cent; total 100 per cent.

Now, are you familiar with a lamp with those ultra-violet radiations? A. Yes.

Q. How would you classify that?

A. That is a cold quartz lamp.

Q. Are all cold quartz types of lamps the same, so far as their ultra-violet radiation is concerned?

A. I think one should specify further and say that it is a cold quartz mercury lamp, because there are other cold types of discharge which involve other things than mercury and get different types of radiation.

Q. Now, are you familiar with the construction and method of operation of such a lamp?

A. Yes.

Q. Will you state just what is the construction of such a lamp and the principle upon which it operates?

(Testimony of Dr. Philip A. Leighton.)

A. Well, it consists of a quartz tube, the dimensions of which are not specific, and an electrode of some relatively inert metal, such as tungsten or tellurium or sometimes nickel, used at each end of the tube. The tube contains [421] an inert gas, such as argon, at very low pressure. The pressure usually runs from two to ten millimeters of inert gas, plus just a small amount of mercury.

In starting the lamp, the lamp is commonly connected up to what is known as a high reactance transformer of a type which submits or which feeds a high voltage across the terminals when the current, when the electricity is turned on. As soon as the lamp starts carrying the current the voltage drops down to a much lower value than the original starting voltage, and usually reaches what we call a steady state, at which there are no changes, after a few minutes. The voltage will then run somewhat of the order, in an arc ten centimeters long, perhaps 200 volts, and the current something of the order of 50 to 100 milliamperes.

This cold quartz type of mercury arc differs considerably in the specifications of the current and voltage under which it operates.

Q. They do not produce much heat or light; is that correct?

A. They don't produce much heat and they don't produce much visible light.

Q. How about infra-red rays? Do they produce any of those? A. No.

Q. None at all?

(Testimony of Dr. Philip A. Leighton.)

A. Very little. It is one of the most efficient sources of ultra-violet radiation that has ever been constructed. [422]

Q. But not of infra-red rays? A. No.

Q. What is your definition of the infra-red ray?

A. That is one which lies at such long wave lengths that it is not visible to the eye, and yet at not such long wave lengths that it can be produced by the methods which are used to produce radio waves.

Q. Now, what is your definition of an ultra-violet ray?

A. That is one which lies at such short wave lengths, that is, it is not visible to the eye, and yet at not such short wave lengths that it can be used by the method to produce x-rays.

Q. What is a wave length, doctor?

A. A wave length is a term which originates from the term, "theory of light," and that the light or radiant energy is propagated in some such fashion that a wave motion is associated with that propagation, and the wave length is simply the distance from one crest to the next, in the wave which is associated with the propagation of light.

Q. And it measures the frequency?

A. The frequency is inverse to the proportion of wave length.

Q. You define it as the distance between the crests of two successive wave lengths; is that it?

A. Yes.

(Testimony of Dr. Philip A. Leighton.)

Q. And the classification of the therapeutic parts of the [423] electromagnetic spectrum are made by the designation of wave lengths; is that correct?

A. Wave lengths.

Q. And what is the standard unit of measuring such wave lengths?

A. The angstrom unit is commonly used.

Q. And what is that?

A. That is a ten-millionth part of a millimeter.

Q. It is the same as one-tenth of a millimicron?

A. The same as one-tenth of a millimicron.

Q. Now, what are the principal radiations in the electromagnetic spectrum?

A. Well, the whole electromagnetic spectrum begins at the long wave lengths, as with such radiations as are emitted from every alternating current lead wire in a building or a house. In other words, just the ordinary lighting current emits a very long wave of the electromagnetic spectrum. The next below are shorter waves in the range which is used for radio transmission. Next below is the range which is given off by what is known as Heat Radiation, given off by such things as a steam radiator or an electric iron. Then next below that is that which is known as infra-red, then visible light, then the ultra-violet light, then x-rays, and then gamma radiation, which is obtained from radium and radium active agents. [424]

Q. In that classification you have started with the highest and gone to the lowest?

(Testimony of Dr. Philip A. Leighton.)

A. From the longest to the shortest.

Q. From the longest to the shortest?

A. Yes.

Q. How would you classify ultra-violet rays, so far as their length is concerned?

A. They are a shorter wave length than visible light, longer than x-rays.

Q. What would be the range, the spectral range of ultra-violet light?

A. Ultra-violet from about 4000 down to 100 angstrom units.

Q. I notice you classify them downwards insteads of upwards. What is the reason for that?

A. I don't know. I suppose one starts from the visible rays of the spectrum as a starting point and goes from there further into the ultra-violet. One usually speaks of the near ultra-violet as representing that part of the ultra-violet nearest to the visible spectrum.

Q. It is customary in the literature to specify them upwards rather than downwards, is it not?

A. Not altogether, no.

Q. You say the visible rays are in the range immediately above the ultra-violet; is that correct?

A. Yes, approximately 4000 to 7500 angstrom units. There is [425] no definite sharp line of demarcation. Some individuals can see shorter wave lengths than others.

Q. What are the lengths of ultra-violet rays found in the rays of the sun, in the natural sunlight?

(Testimony of Dr. Philip A. Leighton.)

A. The ultra-violet rays of sunlight, the limit, the detectable limit will depend on the time of day and time of year, the atmospheric conditions, the latitude and various factors, but generally it runs from 3000 to 2900 angstroms.

Q. Would you say that the sun's rays would contain rays between 2800 and 3150 angstrom units?

A. Contains rays over a part of that region.

Q. That is, are there some of those rays that are between those different—

A. Limits?

Q. —limits? A. Are in the sun, yes.

Q. And most of them are, however, between 3000 and 2900 angstrom units; is that correct?

A. No, most of them are above 3000.

Q. How far above 3000?

A. Well, the intensity—if we start, let us say, at the shortest wave length we can detect in the sun on a particular day and at the particular time and it should be 2950 angstroms, as we go to the longer wave lengths the intensity of the sunlight would increase very rapidly up to a maximum of about [426] 5500 angstroms.

Q. What would be the shortest wave lengths found in the sun's rays?

A. Well, as I say, that depends on the time of day and the time of year, and, to some extent, on the atmospheric conditions and on the latitude, but it runs from 3000 to 2900 angstroms usually.

Q. There are very few of the sun's rays that are below 2900 angstroms; is that correct?

A. That is right.

(Testimony of Dr. Philip A. Leighton.)

Q. I believe you stated that the range of the ultra-violet rays was between 4000 and 100 angstrom units. Is that correct? A. That is right.

Q. Would that be true so far as the most frequently found ultra-violet rays are concerned?

A. Referring to what source?

Q. Either limit, 4000 or 100?

A. That is referring to what type of source?

Q. Artificial sources?

A. Artificial sources?

Q. Yes.

A. Most of the rays found in artificial sources lie between 2000 and 4000 angstroms.

Q. That is, there are very few that are as short as 100 angstrom units? [427]

A. It requires special techniques to get them.

Q. Would you say that the general range of ultra-violet rays would be not shorter than 1800 angstrom units? A. That is right.

Q. And ranging from there to about 4000?

A. That is right.

Q. And as I have described to you the wave lengths of respondent's product in this case, it is a fact that most of those wave lengths are shorter than the wave lengths found in the sun? Is that correct?

A. Well, the one prominent wave length in there is shorter, the——

Q. That is, the 2540—— A. Yes.

Q. ——angstrom unit wave length?

A. Yes.

(Testimony of Dr. Philip A. Leighton.)

Q. Now you have spoken several times in your testimony today about 2537. Will you state what the distinction or difference is between 2537 and 2540?

A. The wave length of this line, which is the intense line in the cold quartz mercury type of arc, is 2537.4, I believe, angstrom units.

Q. And that would be, for all practical purposes, the same as 2540?

A. When one says "2540", he is just expressing it approxi- [428] mately.

Q. Approximately. So far as your testimony is concerned, it would not make any difference one way or the other, because it is such a small amount?

A. That would not make any difference.

Q. I see. Now, you spoke this morning in your direct testimony of the difference between a sun lamp, properly so-called, and a therapeutic lamp. You recognize such a distinction, do you not?

A. Yes.

Q. What would be your definition of a sun lamp, properly so-called?

A. A sun lamp is one which is designed to reproduce, to some extent at least, the range of radiation that obtains in sun light.

Q. Would you say that a correct definition of a sun lamp would be one that emits ultra-violet radiation not differing essentially from that of the clearest weather, mid-day, mid-summer, mid-latitude, sea level, natural sunlight?

(Testimony of Dr. Philip A. Leighton.)

A. That sounds reasonable.

Q. And that would be as nearly a correct definition of a sun lamp as you could think of at the present time?

A. Yes, but I would say that very many of the sun lamps on the market do differ appreciably from that.

Q. That would be the ideal, would it? [429]

A. Yes.

Q. What would be the spectral range of wave lengths of a properly so-called sun lamp?

A. From about 3000 to 30,000 angstrom units, with a maximum of intensity at 5500 angstrom units.

Q. Where would most of the rays be found in that sun lamp?

A. They would be found at wave lengths longer than 5500 angstroms.

Q. I believe you stated a while ago that most of the sun's rays were in the range between 3000 and 2900 angstrom units. Is that correct?

A. No.

Q. What was your testimony about that?

A. My testimony about that was that the short wave length limit of the ultra-violet in sunlight lies between 3000 and 2900. The intensity of ultra-violet in that region of sunlight is extremely small.

Q. You mean by that that there were no rays shorter than that, but there were a large number that were longer than that; is that right?

A. That is correct.

Q. Would you say that any lamp producing an

(Testimony of Dr. Philip A. Leighton.)

appreciable amount of ultra-violet rays less than 2900 angstrom units would not properly be regarded as a sun lamp? A. That is correct. [430]

Q. That would be properly called a therapeutic lamp, would that be correct? A. Yes.

Q. And respondent's product then would be properly a therapeutic lamp rather than a sun lamp, in your judgment?

A. Should not be classed as a sun lamp.

Q. There has been considerable said in your testimony with reference to erythema. Just what do you mean by "erythema"?

A. That means a reddening of the skin.

Q. Is that synonymous with sunburn?

A. Yes.

Q. Is it a desirable condition of the skin or not?

A. In itself it is questionable as to whether it is desirable. Probably it is not, but the best evidence indicates that erythema production and the beneficial effects, such as increased vitamin D activity, bactericidal action, etc., more or less go along with erythema, and to get one, to get those effects, you must also produce erythema.

Q. Do you mean by that that unless you produce erythema it is not possible to have any of the other beneficial effects that you have mentioned?

A. No. One can obtain beneficial effects even with exposures so short that no erythema is produced, but, of course, the extent to which the beneficial effects are produced are lowered also, if one does that. [431]

(Testimony of Dr. Philip A. Leighton.)

Q. Is there any difference between the action of the sun's rays, so far as the production of erythema is concerned, and the action of a cold quartz lamp such as respondent's product?

A. No, I have been able to observe no difference. Erythema seems to be much the same with either.

Q. And the same thing would be true so far as a sun lamp is concerned? A. Yes.

Q. Would the action of a sun lamp be comparable to the action of natural sunlight, so far as erythema is concerned?

A. If the sun lamp fulfills the ideal conditions which we specified, yes.

Q. So that with the ideal of a sun lamp,—

A. Right.

Q. —you get as near the conditions of natural sun as possible? A. Yes.

Q. Would the same thing be true so far as a therapeutic lamp is concerned?

A. You mean with respect to what?

Q. So far as approximating the rays of the sun, natural sunlight?

A. No. I don't think that should be the ideal for a therapeutic type of lamp.

Q. And why not? [432]

A. I think with the therapeutic lamp, the ideal should be that which produces the desired beneficial results with maximum efficiency.

Q. And a sun lamp would take longer to pro-

(Testimony of Dr. Philip A. Leighton.)

duce the same effects than a therapeutic lamp; is that correct?

A. There again one must—before one answers one must specify the intensity of the therapeutic lamp and the distance that it is held from the body.

Q. Now, assuming for the fact of your testimony that the therapeutic lamp is a cold quartz lamp, used in the hand, continually moving over the surface of the skin, at a distance of not more than one inch for a period of not less than one minute and not longer than six minutes, what would be your answer in regard to that?

A. I would say you would get a greater beneficial effect produced than from an exposure of the same length of time by sunlight.

Q. Would the same thing be true, so far as the hand lamp is concerned, of the same cold quartz type, where the lamp is held at a position of 20 to 24 inches from the skin?

A. That would require some experimental work for a specific answer. I should say it should be of the same order of magnitude of time for the cold quartz and sunlight at that distance.

Q. Now, what are the beneficial effects of the ultra-violet [433] rays of the sun, if any?

A. The only beneficial effect that is definitely established is the increase of vitamin D activity.

Q. You are speaking now of the natural sunlight? A. Yes.

Q. Would the same thing be true of the rays,

(Testimony of Dr. Philip A. Leighton.)

of the ultra-violet rays of the sun lamps, properly so-called?

A. Yes. I should add too bactericidal action. I think that is a beneficial effect.

Mr. Tolin: Might I ask to which answer the witness addresses that addition?

The Witness: Bactericidal action?

Mr. Tolin: Yes.

The Witness: To both.

Trial Examiner Reardon: Read the last question now and let the witness answer the last question.

(The question referred to was read.)

The Witness: Yes.

By Mr. Lyon:

Q. That is, would the only effect be the increase of vitamin D activity, that you refer to?

A. Yes. I should, I think, add bactericidal action to both the beneficial effects of both sunlight and the therapeutic type of lamp.

Q. I am speaking now only of the sun's rays, the natural [434] sunlight, and the ultra-violet rays of a sun lamp, disregarding for the present time the therapeutic lamp. A. Oh, I did not——

Q. What would be the effect of those?

A. Well, I should say for both the sunlight and the ideal type of sun lamp, two beneficial effects that have been definitely established would be increased vitamin D activity and bactericidal action.

(Testimony of Dr. Philip A. Leighton.)

Q. Those have been definitely established,——

A. Those have been definitely established.

Q. ——is that correct? A. Yes.

Q. We are speaking now of the sun lamp and the sun rays, as distinguished from therapeutic lamps; is that correct? A. Yes.

Q. Now, what would be the bactericidal effect of the sun and of the ultra-violet rays of a sun lamp, properly so-called?

A. It is a killing of bacteria.

Q. And what kind of bacteria?

A. Almost all kinds.

Q. How deeply would those rays penetrate, so far as bacteria are concerned?

A. They would penetrate into the corium.

Q. That is the outer layer of the skin?

A. No, that is the fourth layer down. That is the last [435] layer of the epidermis proper.

Q. Would there be any difference, so far as the bactericidal effect is concerned, so far as therapeutic lamps are concerned as compared to the rays of the sun and the rays of sun lamps?

A. The therapeutic lamp, if by that we mean one which has a radiation of shorter wave lengths than that found in a sun lamp, would be efficient, more efficient in bactericidal action.

Q. Just what do you mean by that, "more efficient"?

A. That for a given exposure, a smaller exposure would be required to kill bacteria.

Q. With a therapeutic lamp? A. Yes.

(Testimony of Dr. Philip A. Leighton.)

Q. You mean by that all therapeutic lamps, or just a certain type of therapeutic lamp?

A. I think that should be limited to certain types of therapeutic lamps.

Q. What types would those be?

A. Both the cold and hot mercury arcs in quartz would be of that type.

Q. Which is the more efficient of those two types? A. The cold.

Q. How far would that efficiency go, in your opinion, so far as bacteria are concerned? [436]

A. I don't know just what you mean.

Q. That is, the effect of a cold quartz lamp.

A. Oh, you mean in the skin?

Q. Yes.

A. That also penetrates to the corium. I think the penetration of 2537 into the corium is about 7/10ths as great as the penetration of 3000 angstroms into the corium.

Q. Now, what does this 3000 angstrom units denote, so far as a measuring stick is concerned? Just what is the significance of that figure?

A. 3000 angstroms mean 3000/10,000,000th of a millimeter.

Q. Yes, I know, but I mean so far as the exact number of angstrom units is concerned. Is that the natural sunlight, that you referred to there?

A. 3000?

Q. Yes.

A. That is very close to the limit of ultra-violet in natural sunlight; between 3000 and 2900 you can

(Testimony of Dr. Philip A. Leighton.)

say is the limit, the ordinary limit of ultra-violet in natural sunlight.

Q. And you say at 2537 angstrom units, found in the cold quartz type of therapeutic lamps, that would be 7/10ths as effective as the natural sunlight; is that correct?

A. No, I would say that about 7/10ths—the penetration of the 2537 angstroms line of cold quartz lamp into the corium, the inner layer of the skin, would be about 7/10ths [437] as great as the penetration of ultra-violet of 3000 angstroms into the corium.

Q. You mean by that the cold quartz rays would not penetrate as deeply as the sun's rays; is that correct?

A. No. I mean if we should expose the surface of the skin to two beams of light, one of 2537 angstroms and one of 3000 angstroms, that the amount of the 2537 which penetrated through to the corium would be about 7/10ths as much as the amount of 3000 which would penetrate through to the corium.

Q. That is, there would not be as much penetration?

A. There would not be as much, but there would be 7/10ths as much.

Q. But what would penetrate would be as much,—that is, there would be a less amount of penetration, but what would penetrate would penetrate as deeply; is that correct?

A. Would penetrate as deeply.

Q. I believe you said the minimum amount of

(Testimony of Dr. Philip A. Leighton.)

bactericidal action would start at about 2400 angstrom units; is that correct?

A. As I recall, I said this morning simply starting from that point and going to longer wave lengths, we traced the approximate change in bactericidal action with wave lengths.

Q. Didn't you state that 2400 would be the minimum?

A. I believe there is—yes, there is a minimum around 2400 or 2500 angstrom units in the bactericidal action. [438]

Q. And that is going up to a maximum at about 2700 angstrom units? A. About 2700.

Q. And then it decreases from there, does it?

A. Decreases from there.

Q. Up to what point?

A. That reaches zero at between 3000 and 3100 angstroms.

Q. And the 2540 angstrom units would be within the minimum zone, would it, rather than the maximum then?

A. 2540 is on the ascending part of the maximum zone. It is between the minimum and the maximum.

Q. It is not either minimum nor maximum?

A. No.

Q. Is that correct? A. Yes.

Q. Then it would be approximately as the sun's rays?

A. It would be higher than the sun.

(Testimony of Dr. Philip A. Leighton.)

Q. That is, when it goes up to as high as the sun's rays, it goes down?

A. The efficiency is lower.

Q. So far as bactericidal action is concerned,—

A. Yes.

Q. —above 2700 angstrom units; is that correct? Above 2700 angstrom units, it has a descending penetration?

A. A descending effectiveness. [439]

Q. Effectiveness? A. Yes.

Q. You also spoke about getting a coat of tan from a sun lamp and not from a therapeutic lamp?

A. Yes.

Q. What is the reason for that?

A. The wave lengths above 3000 angstroms, from there on up several hundred angstroms, as least, will produce pigmentation, whereas they do not produce these other effects we have mentioned, and the wave lengths above 3000 wave lengths, as we go up, become much more intense in sunlight.

Q. Would the coat of tan be a beneficial effect or not?

A. As far as I can determine, opinion is divided on that.

Q. But, in your opinion, the cold quartz type would not given any appreciable tanning of the skin?

A. The cold quartz type does not give pigmentation—does not give as great a pigmentation as the wave lengths above 3000 angstroms.

(Testimony of Dr. Philip A. Leighton.)

Q. Pigmentation would have nothing to do so far as the bactericidal action or erythema producing effects are concerned? A. No.

Q. That would simply have to do with the appearance of the body, would it not? A. Yes.

[440]

Q. And those effects are not very beneficial, in your opinion? A. No.

Q. Other than the appearance of the body, if you want a tanned appearance?

A. That is right. The chief physiological effect seems to be that the pigment stops the penetration of infra-red rays, the heat rays of the sun into the body, and thereby prevents the heating of the subcutaneous tissues by intense sunlight.

Q. Then, in your opinion, so far as the bactericidal effects are concerned, there is no appreciable difference between natural sunlight and the ultra-violet rays of a sun lamp, and the ultra-violet rays of a cold quartz lamp, such as respondent's product; is that correct?

A. No specific difference.

Q. That is, one is not any more effective than the other?

A. The cold quartz lamp would be much more efficient in the bactericidal effect.

Q. And for what reason?

A. Because the efficiency of that wave length is greater than the longer wave lengths over a shorter exposure, and gives the same results.

(Testimony of Dr. Philip A. Leighton.)

Q. Have you had any personal experience along that line?

A. Yes, I have made some personal experiments on that. [441]

Q. Just what have you done along that particular line?

A. Well, my wife had a skin infection two years ago, and we first tried exposure to a hot quartz lamp, which I had set up in the laboratory. I think she tried sun light too, and it didn't do anything. I brought home a cold quartz lamp and gave her several treatments, and it helped appreciably.

Q. And what was the skin infection?

A. I don't remember the name of it.

Q. Did you have it treated by a physician at that time? A. Yes, we did.

Q. Did he give any particular diagnosis of it?

A. It was a—yes, he did, but I am afraid it has slipped my mind.

Q. He was treating it also, in addition to the treatments at home?

A. No. We were following his prescription in giving her these treatments.

Q. And she was under the supervision and direction of a doctor all of that time?

A. Yes. We sort of collaborated on it.

Q. That is the only experience that you have had with the bactericidal action?

A. That is the only direct experience with bactericidal action.

Q. Just that one particular instance? [442]

(Testimony of Dr. Philip A. Leighton.)

A. Yes.

Q. You have never experimented in the laboratory? A. Not with bacteria.

Q. Would you have any knowledge as to what bacteria it was that caused your wife's condition at that time?

A. I did know, but I am sorry I have forgotten.

Q. Would you know whether it was bacteria found on the surface of the skin or below the surface of the skin?

A. They were in the corium layer of the skin.

Q. How would you know that?

A. That was quite definite from the appearance of the thing. The corneum layer peeled off, and this infection spread underneath it.

Q. You are not a medical doctor, are you?

A. I am not a medical man.

Q. Have you had any medical training or experience at all? A. No, I have not.

Q. What education or experience did you have relative to the different layers of the skin and all that sort of thing?

A. That is from my own reading and discussion with scientific colleagues.

Q. It has been more or less apart from your regular duties as a teacher of chemistry?

A. No. That is our work, the chemical effects in the skin, and as a photochemist, that is a part of my interest. [443]

(Testimony of Dr. Philip A. Leighton.)

Q. Now, you spoke about four layers of the skin; is that correct? A. Yes.

Q. There are four layers? A. Yes.

Q. And that is generally recognized?

A. Yes. Oftentimes the two center layers, the granulosum and the germinativum, are classed together as one main layer, the malpighia or malpighian layer.

Q. I believe you stated that in your testimony you had not differentiated or included all of those layers together, so far as the action of the ultra-violet rays was concerned. That is, your testimony dealt only with each specific layer; is that right?

A. That is right.

Q. Now, would your testimony be any different considering all of the layers together, as found in the skin, and considering the action of the ultra-violet rays of the cold quartz lamp on the skin as composed of those four layers?

A. No. I would say that as far as the penetration was concerned, there are no marked differences to be ascribed to any of the wave lengths in the region, 2500 to 3050 angstroms.

Q. That is, is it your testimony that the penetration of the skin as a whole would have the same penetration of each layer of the skin, as you described? [444]

A. No, I would say if we started with the surface of the skin and allowed radiations of various wave lengths in this region, but of the same intensity, to fall upon it, and then would measure the

(Testimony of Dr. Philip A. Leighton.)

percentages of those different wave lengths which reach through the corneum into the granulosum, through the granulosum into the germinativum, and into the corium, and so forth, we would find no great differences between any different wave lengths in that region.

Q. I believe you gave 2500 angstrom units as the minimum of penetration; is that correct?

A. No.

Q. Through all those different layers?

A. No. I said in the range between 2500 and 3050 we didn't find any marked differences in penetration.

Q. Taking your testimony with reference to the penetration of the corneum, didn't you state that the absorption above 3100 angstrom units increased to a maximum at 3500 angstrom units?

A. Corneum?

Q. Yes. A. No.

Q. And that it decreased to 2500 angstrom units as a minimum?

A. I said above 2400 angstroms, starting at 2400 the absorption of the corneum decreases to a minimum around 2500. [445]

Q. Yes, that is what I understood you to say.

A. Yes. Then it increases to a maximum around 2700 or 2800, and then decreases again in wave lengths above that.

Q. Then the range of 2540 angstrom units as found in cold quartz would be near the minimum, would it not?

(Testimony of Dr. Philip A. Leighton.)

A. Near the minimum of absorption of the corneum.

Q. And the same thing would be true so far as the granulosum is concerned, would it not?

A. Yes. That means that 2537 penetrates the corneum and granulosum more efficiently than 2800 angstroms does.

Q. The same thing would be true so far as the deeper layers are concerned?

A. No. The other deeper layers did not show a minimum of 2500 followed by a maximum of 2700 or 2800.

Q. What do the deeper layers show, so far as the minimum is concerned? What would be the minimum for those?

A. They don't show any minimum. They show very high absorption at wave lengths below 2400 angstroms. The absorption of the germinativum drops off fairly rapidly in the longer wave lengths. The absorption of the corium drops off quite rapidly from 2400 to 2500. Then it becomes just about constant for several hundred angstroms, and then starts to drop off again.

Q. That is, the absorption in those underlying layers of the skin is less at 2537 angstroms than the lower—— [446]

A. The absorption of those underlying layers is greater in the germinativum than at longer wave lengths, and is about the same at 2537 as at other wave lengths up several hundred angstroms toward

(Testimony of Dr. Philip A. Leighton.)

higher wave lengths, and then the absorption drops off.

Q. And your testimony would be the same so far as those different layers are concerned; is that correct? So far as the absorption is concerned, is that correct?

A. My testimony would be the same in what regard, do you mean?

Q. In comparison with the absorption of the ultra-violet rays around 3000 angstrom units?

A. The ultra-violet rays around 3000 angstroms as compared with 2537?

Q. Yes, that is correct.

A. Yes, the relative absorption of those four layers is just about the same at those two wave lengths.

Q. Yes, putting it along some generalization, if we can. We don't want to be too specific.

A. Yes.

Q. And you said the absorption was slightly greater at 2537 angstrom units than at 3000; is that correct? A. Yes.

Q. And translating that to the terms of the product involved in this case, would you say that the penetration of a cold [447] quartz lamp would be slightly more effective than the natural rays of the sun?

A. The other way around. The natural rays of the sun would be slightly more penetrating than the cold quartz lamp.

(Testimony of Dr. Philip A. Leighton.)

Q. Would the same thing be true so far as sun lamps are concerned?

A. The ideal type of sun lamp, yes.

Q. What difference would that make as to the bactericidal value?

A. Well, the bactericidal value for bacteria in the corium layer, let us say, would depend, first, on those relative transmissions into the corium layer, in which the ultra-violet rays of the sun would be transmitted somewhat more than those in the cold quartz light, plus the relative efficiency of those two wave lengths in producing bactericidal action. There the efficiency of the cold quartz lamp is much higher. The net result would be that the bactericidal action of the cold quartz lamp for bacteria in the corium should be greater than that of sunlight for bacteria located in the corium.

Q. Translating that to terms of common speech, would that mean that the rays possibly would not be as strong, but as used in this particular lamp they would be more efficient?

A. Principally, they would not be as strong, but they would be more efficient, so it would take less of them.

Q. And that would be due to the method used in this particular [448] lamp; is that correct? That is, I mean by being held so close to the skin?

A. No, that wouldn't have anything to do with it.

Q. What would be the reason for the greater efficiency?

(Testimony of Dr. Philip A. Leighton.)

A. The wave length is the determinative factor.

Q. You mean that the shorter wave length would be more efficient than the longer wave length?

A. Comparing those two, yes.

Q. Comparing those two? A. Yes.

Q. It would make no difference as to whether you were comparing the natural sun or any artificial source?

A. If it is an ideal type of sun lamp, or if it were some other artificial sources, then the answer would be different.

Q. I see. But so far as the cold quartz lamp is concerned, you would regard that as an efficient source, would you?

A. That is the most efficient source that has yet been developed.

Q. You mean, of any artificial source?

A. Yes.

Q. Do you mean by that as compared to hot quartz, for example? A. Yes.

Q. And carbon arc lamps? A. Yes.

Q. In your opinion, it is more efficient than any of those,— [449] A. Yes.

Q. —so far as bactericidal action is concerned? A. That is right.

Q. I believe you stated that the rays of the sun would have no appreciable bactericidal effect; is that correct? I believe you limited it only to the activation of vitamin D?

A. I tried to introduce that other statement afterwards, you will remember.

(Testimony of Dr. Philip A. Leighton.)

Q. What was that?

A. That I felt I should add to that also that it had a bactericidal action.

Q. But it was slight?

A. But it is slight compared to that of the cold quartz.

Q. And the cold quartz lamp also is rather slight, is it not, so far as bactericidal action is concerned?

A. No, I don't think I would say it is.

Q. Well, in your testimony all the way through you have used the words "slightly greater." I would like to find out, if possible, just what difference there would be and what you mean by the words "slightly greater".

A. "Slightly greater," all right. For example, I say the penetration of 3000 angstroms into the corium is slightly greater than the penetration of 2537 into the corium. The actual figures, average figures, I believe, of radiation instituted in the layers of the skin, are about 16 per cent of [450] the radiation of 3000 angstroms reaches the corium, and about 11 per cent of the radiation of 2537 reaches the corium, a ratio of about 7/10ths to 1, which I used before.

Q. That was produced how?

A. Those were obtained by actual measurements.

Q. By actual measurements? A. Yes.

Q. And by the use of artificial sources of ultra-violet energy? A. Yes.

Q. Of cold quartz lamps?

(Testimony of Dr. Philip A. Leighton.)

A. No. I think that a hot quartz lamp was used in those determinations.

Q. You have never used any hot quartz lamps in your experiments, have you?

A. Oh, yes. I designed several of my own.

Q. Now, you have spoken about ergosterol in your testimony. Just what was that again, Doctor?

A. I said quite a bit about ergosterol.

Q. Yes. Just what is ergosterol?

A. Oh, just what is it?

Q. Yes.

A. It is a member of the chemical family of sterols.

Q. What is a sterol?

A. A sterol is an organism, family of organic compounds [451] which has a complex ring structure. It is a compound of carbon, hydrogen and oxygen, and the detailed structure of it is not yet definitely known.

Q. What is its relationship to vitamin D?

A. By exposure of the sterols to ultra-violet radiation, increased vitamin D activity is produced in the body. Presumably vitamin D itself is not any definite chemical compound, but vitamin D activity is due to the production of some particular chemical configuration of atoms and molecules, and by exposure of these different sterols to ultra-violet radiation, that configuration is produced. But by exposure of ergosterol, the actual chemical molecule at which that configuration is produced may be dif-

(Testimony of Dr. Philip A. Leighton.)

ferent from the one that would be produced by exposure of cholesterol.

Q. You spoke about ergosterol being found only in the corium layer. That is the lowest layer; is that correct?

A. Chiefly in the corium layer.

Q. And you spoke of it as being absorbed. What is the chemical effect of the absorption?

A. I spoke of it as absorbing light.

Q. Absorbing light? A. Yes.

Q. And that set up a chemical reaction?

A. Yes.

Q. What would that produce? [452]

A. The particular product in the absorption of ergosterol is called calciferol.

Q. And what relationship would that have to vitamin D?

A. Calciferol contains this special configuration of atoms and molecules which give rise to the antirachitic activity.

Q. You said that was an action which was relatively minor at 2400 angstrom units; is that correct?

A. No. In so far as the relative efficiency of different wave lengths below 3000 angstroms in producing vitamin D activity, it has not been definitely established. It is known that all wave lengths between 3100 and, at least, down to 2400 produce vitamin D activity, but the relative efficiencies have not yet been definitely established.

Q. Well, I made some notes of your testimony on that point, and I wish you would correct me if

(Testimony of Dr. Philip A. Leighton.)

my memory is wrong on that. I noted that you stated that the absorption is relatively small at 2400 angstrom units and increased towards wave lengths with a maximum at 2700 to 2800 angstrom units, decreasing to small at 3100 angstrom units.

A. That is the absorption of ergosterol itself to light. The maximum at 2700 to 2800, and another maximum between 2900 and 3000, a smaller maximum.

Q. That was the factor which produces the vitamin D; is that correct?

A. That is one of the sterols, just taking that as an [453] example of the sterols. Cholesterol is another sterol which occurs in the skin.

Q. Now, this range of 2540 angstrom units would be close to the minimum, would it not, according to that statement?

A. It is known that vitamin D activity is produced at least to 2400 angstroms, and you don't know how much further, but presumably the production would increase to the limit of the absorption curve of ergosterol.

Q. And the absorption curve limits would be 2400 and 3100?

A. It extends at least to 2400. I don't think the lower limitation has been determined, but it is decreasing as one goes down to shorter wave lengths.

Q. There would be a total of about 700 angstrom units in that range, would there not, as between 2400 and 3100 angstrom units?

A. Yes, about 700 angstrom units.

(Testimony of Dr. Philip A. Leighton.)

Q. Then the 2540 angstrom units would be at the lower end of that range, would it? A. Yes.

Q. And it would be smaller than the maximum?

A. Smaller than the maximum.

Q. I believe you stated it would be approximately the same as the absorption for 3000 angstrom units? A. That is right.

Q. Now, translating that into popular speech, what would be [454] the effect in the production of vitamin D by the use of a cold quartz lamp, such as respondent's product, as compared to natural sunlight or a sun lamp, properly so-called?

A. That means of the light which reaches the ergosterol bearing layers in the skin that the same amount will be absorbed at 2537 angstroms as is absorbed at 3000 angstroms.

Q. What would be that relationship to the production of vitamin D?

A. Once again, it has not been definitely established as to whether the production of vitamin D—as to how the efficiency of vitamin D varies with the wave length.

Q. Then you would not be able to give us an opinion with reference to the efficiency of respondent's product here, so far as the production of vitamin D is concerned? Is that correct?

A. I could say that it has been definitely established that that wave length does produce vitamin D, and it would be my opinion that the efficiency of the vitamin D production for that wave length would be about the same as that of 3000 angstroms.

(Testimony of Dr. Philip A. Leighton.)

Q. That is, it would be no more efficient than natural sunlight or a sun lamp, properly so-called?

A. No. It would be of the same order.

Q. Something was said about vesiculation, Doctor. That simply means production of blisters, does it not? [455]

A. No. Vesiculation is ascribed to the rupture of a cell wall and exudation of the protoplasm through the rupture out of the cell.

Q. You spoke of its producing blisters?

A. Yes.

Q. What did you mean by that?

A. Blisters are the result of vesiculation.

Q. The vesiculation itself, technically means the coagulation of the protoplasm in the cells; is that correct?

A. Yes, vesiculation is the result of coagulation of the protoplasm of the cell.

Q. It is the result? A. The result, yes.

Q. What is the blister? Is that a result, or a symptom, or what?

A. It is a result of vesiculation; a symptom of it too, yes.

Q. Is that the only result that is ordinarily visible?

A. I think that is the only result I have ever seen.

Q. Does that have any connection with the bactericidal effect of ultra-violet rays? [456]

A. Not directly.

(Testimony of Dr. Philip A. Leighton.)

Q. Vesiculation, as I understand it, has nothing to do with germs, or bacteria, or anything like that?

A. No.

Q. It is not ordinarily used in connection with the human body or the skin, or any parts of the human body?

A. You mean the term?

Q. Yes.

A. Yes. That can be used with regard to cells in the human body, as well as individual cells.

Q. In what connection? In what way? How would you speak of it?

A. Rupture of the cell wall and the ejection of the protoplasm from the cell.

Q. I believe that, summing up your testimony along this line, you stated that such a product as respondent's product, with a radiation lying mostly in the range of 2540 angstrom units, would produce no vesiculation in the human body. Is that correct?

A. I don't think I said that.

Q. Well, what did you testify on that?

A. I would say that the light of 2537 angstroms would produce vesiculation, but with a lower efficiency than light at 2600 or 2700 or 2800 angstroms, but with a higher efficiency than a light of 3020 angstroms. [457]

Q. What would that mean in terms of the skin, or as relating to the skin?

A. To answer that, one would have to combine these figures for vesiculation efficiency with the transmissions of the various layers of the skin, and

(Testimony of Dr. Philip A. Leighton.)

the resultant effect would be due to the interrelation of those two things.

Q. What would that interrelation amount to?

A. Well, then let us compare again 2537 with 3020 angstroms. The transmission at 3020 angstroms into the corium exceeds that of 2537 by about the ratio of 1 to 0.7, but the efficiency of 2537 in producing vesiculation exceeds that of 3020. I don't recall the exact figures for those relative efficiencies. The net result would be obtained by combining those two.

Q. What would that result be on the skin?

A. Without being able to recall the figures for 2537 and 3020 on vesiculation, I don't know what the relative efficiency of those two wave lengths in producing vesiculation in the corium would be.

Q. What is the significance of the 3020 angstrom units?

A. That is taken because that is the most intense line in this effective region of the ultra-violet in the mercury type of sunlight, mercury vapor type of sunlight.

Q. That would be a sun lamp, properly so-called?

A. That is a sun lamp wave length, yes.

Q. How does that compare with natural sunlight? [458]

A. Well, that is in the region which is found in natural sunlight.

Q. What would be the distinction between a mercury type of sun lamp, which you just referred to,

(Testimony of Dr. Philip A. Leighton.)

and the mercury arc, mercury quartz arc, such as respondent's product?

A. The relation between them?

Q. Yes. What would be the difference between them?

A. One gives wave lengths which are limited to the region above 2900 angstroms. The other gives radiation which is chiefly at 2537 angstroms.

Q. The difference is chiefly in the wave lengths?

A. The difference is chiefly in the wave lengths. I believe the average commercial sun lamp has a considerably lower intensity of ultra-violet radiation than does the cold quartz lamp.

Q. That is, it takes longer to produce the same effect? Is that what you mean? A. Yes.

Q. Now, do you mean by that that the shorter wave lengths found in the cold quartz lamp are harsher in their effects? A. No.

Q. What do you mean? Are they——

A. Harsher?

Q. Yes.

A. I don't know what is meant by that. [459]

Q. Is there such a term used?

A. I have never observed any such thing as that.

Q. What is the distinction in the effect of the shorter, as compared to the longer rays?

A. No specific difference. They both produce vitamin D activity, both produce erythema and both produce bactericidal action.

Q. One will take longer to produce the same effect; is that correct?

(Testimony of Dr. Philip A. Leighton.)

A. If you had them at the same intensities, the efficiency for bactericidal action would be greater for the short wave length. The efficiency for erythema production would be approximately the same. The efficiency for vitamin D activity, although that has not been established, the best we can say at present is that it is approximately the same at those two wave lengths.

Q. Those would be typical of sun lamps for the one, and cold quartz lamps for the other; is that correct? A. The ideal type of sun lamps.

Q. The ideal type of sun lamps? A. Yes.

Q. In your opinion, would the cold quartz rays be more intense than the ideal type of sun lamp's rays?

A. No. I think the cold quartz ultra-violet is more intense than the average present commercial type of sun lamp. [460]

Trial Examiner Reardon: Doctor, I think you said a while ago that you measured the penetration, as I understand it, of the ultra-violet to certain layers of the skin by means of the hot quartz lamp. Is that correct?

The Witness: Yes.

Trial Examiner Reardon: Was the hot quartz lamp chosen for the purpose of measuring casually or by design, rather than the cold quartz?

The Witness: It was chosen because, as a laboratory instrument, it serves as a source for a number of different wave lengths, and if one wants to make

(Testimony of Dr. Philip A. Leighton.)

comparison for different wave lengths, it is a more convenient one to use.

Trial Examiner Reardon: You do measure the penetration of the ultra-violet ray by the cold quartz?

The Witness: By the cold quartz, and it would be the same exactly as with the hot quartz.

Trial Examiner Reardon: I see. When you specified the hot quartz, I wondered if it was by design or meant anything.

The Witness: It is just because it is a more convenient source for laboratory use.

By Mr. Lyon:

Q. To obtain the same results then by the use of the cold quartz lamp, you would not have to expose the skin as long as you would with the natural sunlight or with the sun lamp; [461] is that correct?

A. With the average commercial sun lamp, that is right.

Q. And also less than the natural sun?

A. Yes.

Q. In view of that, wouldn't you say that the rays of the cold quartz lamp were more intense than those of a sun lamp or the natural sun?

A. I think the intensity is greater than that of the average commercial sun lamp or the natural sun. [462]

Q. Now, what was your testimony as to the stimulation of the [463] metabolism of the body by the use of a cold quartz lamp?

A. Through increased vitamin D activity, that

(Testimony of Dr. Philip A. Leighton.)

stimulates the calcium phosphorus metabolism in the body.

Q. I believe you stated just a few minutes ago that, in your opinion, was no greater than by the use of a sun lamp? A. That is right.

Q. And it would be no greater than the natural rays of the sun? A. That is right.

Q. In your opinion, there is no particular advantage in the use of a cold quartz type of therapeutic lamp, so far as the activation of vitamin D is concerned? A. No.

Q. Coming down to the beneficial effects of the cold quartz type of lamp, what would you state, in your opinion, are such beneficial effects or results?

A. Only two have been definitely established. That is increased vitamin D activity and bactericidal action.

Q. You say that the increased vitamin D activity would be no greater than any other type of lamp; is that correct? A. I didn't say that.

Q. You said as far as sun lamps or natural sunlight?

A. The ideal type of sun lamp or natural sunlight.

Q. But there might be other types of therapeutic lamps which might be more effective in that respect? [464] A. More or less.

Q. Yes. So far as the bactericidal effect was concerned, I believe you stated there was a slight advantage in such a lamp over the sun lamp. Is that correct? A. That is correct.

(Testimony of Dr. Philip A. Leighton.)

Q. In your opinion, is there any advantage in the use of such a lamp as respondent's product over an ordinary sun lamp or the natural rays of the sun?

A. In a case where bactericidal action is desired, yes.

Q. You believe there is a slight——

A. Advantage.

Q. ——a slightly better bactericidal action?

A. Yes.

Q. Not very much greater though? Is that correct?

A. Yes, I would say it was greater, but not markedly greater.

Mr. Lyon: That is all I have. No further questions. [465]

CERTIFICATE

This is to certify that the attached proceedings before the Federal Trade Commission in the matter of: Docket No.—4407, Case Title—Ultra-Violet products, Inc., a corporation. Place—Los Angeles, California. Date—May 31, 1941, were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

ETHEL E. FISHER & ASSOCI-
ATES, INC.

Official Reporters

By D. MacMILLAN

Assistant Secretary

DR. FLOYD ROSWELL PARKS

was thereupon called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Tolin:

Q. Will you state your name, please?

A. Floyd Roswell Parks. [469]

Q. What is your vocation?

A. Physician and surgeon.

Q. Where did you take your training, that is, your training in medicine and surgery?

A. Harvard University.

Q. When did you graduate from Harvard?

A. June, 1925.

Q. How long have you practiced medicine in the State of California? A. Since 1929.

Q. Have you, during that time, engaged in the general practice of medicine and surgery?

A. Yes.

Q. Are you on the staff or staffs of any of the hospitals here? A. Yes, sir.

Q. With what hospital or hospitals are you connected?

A. I have been associated with the General Hospital, the Children's, the California, the St. Vincent's, the Queen of Angels, the Hollywood. I guess that is about all of them.

Q. To what medical organizations do you belong?

A. The Los Angeles County, the State, the American Medical Association; a fellow of the American

(Testimony of Dr. Floyd Roswell Parks.)

College of Surgeons, and a member of the Los Angeles Surgical Society.

Q. What degree did you take at Harvard? [470]

A. Doctor of Medicine.

Q. Have you used ultra-violet light in your practice? A. Yes, sir.

Q. Are you familiar with the type of ultra-violet light that emanates from a cold quartz lamp giving off approximately 2537 angstrom units?

A. Yes, sir.

Q. Have you observed the results of that light upon the human body? A. I have.

Q. Have you given some study to the use of ultra-violet light— A. Yes.

Q. —in the treatment of disease?

A. Yes.

Q. And in its effect upon the health of the human body? A. Yes, sir.

Q. Are you familiar with the type of cold quartz lamp that is manufactured by the respondent here, the Ultra-Violet Products, Inc.? A. I am.

Q. Do you know their model known as the Life Lite? A. Yes, sir.

Q. I refer to a small hand lamp. Have you seen that one? A. Yes, I have. [471]

Q. I show you Commission's Exhibit 9, which is a circular upon which there is depicted various types of respondent's lights. You may look at both sides and indicate which of the types of respondent's lights you have seen.

A. I have seen this one here (indicating).

(Testimony of Dr. Floyd Roswell Parks.)

Q. The witness refers to——

A. Model AC.

Q. Model AC, or rather, Model H7?

A. Yes.

Q. On the other side of the page, Doctor, there appear to be different models. Have you seen any of those?

A. No, I haven't. I have used this other one. This (indicating) is the one I usually recommend.

Q. You say you usually recommend. What do you mean by that term, Doctor?

A. Well, if a patient comes in to ask me about a quartz lamp, an ultra-violet lamp, why, I tell them immediately that there are many kinds on the market, a good many of which are absolutely worthless, but this particular lamp I have found to be very beneficial, and that is the one that I do recommend.

Q. Are you interested in the Ultra-Violet Products, Inc.?

A. Only just very indifferently.

Q. I mean by that, do you hold any stock or have any contracts with it, or anything of that sort?

[472]

A. No, I don't.

Q. When did you first become acquainted with Mr. Thomas Warren, the president of that company?

A. Well, I had heard of him. I think I had met him just a short time ago.

Q. For what purpose did you recommend that

(Testimony of Dr. Floyd Roswell Parks.)

particular model of the respondent's lamp that you have identified on Exhibit 9?

A. Well, the patient that I have in mind is also a graduate of Harvard College and Law School, who had two youngsters, both of which tended to be not in too good health, and it was rather difficult for the mother to bring them into the office for the treatment, so I advised the use of this particular lamp which I pointed out. I thought it would save the mother a lot of unnecessary running to the office, and would do a lot of good, so I recommended it.

Q. For what condition?

A. Well, the little girl was run down. She was rather nauseated if she took cod liver oil and vitamin D by mouth. She had a stomach disorder which rather tended to be chronic. I thought that the cold quartz would help to give her the necessary vitamin D and, therefore, I was very happy to recommend it.

Q. Did you observe any improvement in the child afterwards?

A. You would hardly recognize the youngster now. The [473] stomach trouble has been lost and the youngster is very ruddy and healthy.

Q. Do you know whether the parents actually used the lamp at home for the treatment of the child? A. Yes, they did. [474]

Q. What is the difference between a sun lamp and a therapeutic lamp?

A. A sun lamp is one which gives out the vari-

(Testimony of Dr. Floyd Roswell Parks.)

ous wave lengths found in ordinary sunlight, which wouldn't contain purely ultra-violet, whereas an ultra-violet lamp is more apt to approximate the 100 per cent mark of purely ultra-violet rays, rather than the infra-red and the other rays in sunlight.

Does that answer it?

Q. Yes. Is there a difference in the angstrom units of [483] the ultra-violet light found in sunlight, and that which emanates from a lamp such as respondent manufactures? A. Yes.

Q. Which is it that has the longer rays?

A. The more efficient ultra-violet lamps have the greater angstrom units. Therefore, they are much more efficient.

Q. Do you mean by that they have the short rays, the rays that are below those that come from natural sunlight? A. Above those.

Q. How are those rays designated?

A. Well, they are designated usually above a certain figure or below a certain figure. It is more of a capacity in numbers of angstrom units in an ultra-violet light. A therapeutic lamp will be much greater than a sun lamp, which has relatively few in comparison.

That is more of a physical problem, one in physics than it is of medicine. We just know that because they tell us that. I have never figured the actual length of one of those angstrom unit lights.

Q. Well, are you talking about the relative efficiency of the lights in producing effects upon the human body?

(Testimony of Dr. Floyd Roswell Parks.)

A. Well, the relative efficiency would be much greater in a pure therapeutic or ultra-violet lamp than it would in a sun lamp, because one is emitting the rays of sunlight and the other is taking everything out except pure ultra- [484] violet rays, which are the shortest rays.

Q. The ultra-violet rays are the shortest rays?

A. The shortest rays.

Q. And is that the type of ray that comes from the respondent's lamps? A. That is right.

Q. Is there any difference, in so far as you have been able to observe, in the effect upon the body of rays that emanate from a sun lamp and from a cold quartz lamp? A. I didn't quite get that.

Q. Will you read the question?

(Question read by the reporter.)

A. Well, you are talking about two entirely different things. The sun lamp, as I said, gives you sun light, and the lamp put out by the respondent or a cold quartz lamp gives you more of those ultra-violet rays, which are more beneficial, and, therefore, the reaction from those two lamps in those individual cases are entirely different. One would be beneficial, and the other might be as efficient as the sun. A good sunburn is all right as far as it goes, but it doesn't go far enough.

Q. You mean, then, you can obtain the effect in a much shorter exposure from a cold quartz light than you can by going into the natural sunlight?

A. Yes. [485]

Mr. Lyon: That is objected to as leading.

(Testimony of Dr. Floyd Roswell Parks.)

Trial Examiner Reardon: It is answered.

The Witness: The cold quartz is the one best agent for putting out the ultra-violet rays in great quantities, whereas your sun lamp is only giving relatively few of those ultra-violet rays, because they have all the infra-reds, which are the heating rays, along with it. In other words, you have the whole spectrum in the sun lamp, and you have only the ultra-violet rays in the quartz.

Q. What is the effect of the use of a cold quartz light upon the human body?

A. It activates the deeper layers of the skin, the cells of the deeper layers of the skin, to produce vitamin D, which is exceedingly beneficial to the body.

Q. How does that influence the functioning of the body?

A. Well, it would improve circulation, which would help to eliminate certain waste products, in particular, your nitrogenous waste products. It is very helpful in diseases like rheumatism and gout, where your nitrogenous waste products may be stored in large quantities, or in larger quantities than in ordinary circumstances, and, of course, if those substances are eliminated, then we have a great beneficial result.

Q. Is there any effect upon the calcium phosphorous [486] metabolism? A. Yes.

Q. What is that effect?

A. Well, it helps to produce this vitamin D, which helps to improve your calcium metabolism

(Testimony of Dr. Floyd Roswell Parks.)

in disease like rickets, where that is usually under par. Of course, that is greatly stepped up to do away with rickets, and in case we have a rachitic disease, you can eliminate it entirely.

Q. Could the respondent's lamp be used as a beneficial aid in the treatment of bronchitis?

A. Yes.

Q. Is it useful in convalescence from acute illness?

A. Yes. I think that is one decided beneficial effect. I use that, and I use it in long cases of illness. I have a patient right now where we operated because of a diseased condition on the esophagus, and with its resulting infection it lowered the patient's vitality so that the patient lost about 15 pounds in weight. We have been giving her those tonic treatments in the office and she has picked up 12 pounds of that weight in the last seven weeks. We do get and see miraculous results. Just what happens, the Lord only knows, but you know you get them, and that is the essential thing.

Q. Do you feel that the use of that type of lamp, referring to the lamp that respondent manufactures, in the home without medical supervision has any danger to the layman? [487]

A. I wouldn't think so.

Q. Do you consider that it is either a good or a bad health practice?

A. Well, I think it is a decided adjunct in the home. That is the way I would like to answer that question. There are so many things that come up

(Testimony of Dr. Floyd Roswell Parks.)

in a home that it just seems impossible, from an economic standpoint in most instances, to keep running to the average doctor's office. It would be better to have something like that rather than having them go to the quack, who would give them various treatments without having the knowledge of them. I would much rather have the patient use that in his home than to do that.

Q. Do you know whether it is useful in the treatment of [488] ringworm?

A. Very useful, because one treatment will usually clear it up.

Q. Is it useful in the treatment of athlete's foot and other fungus infections? A. Yes, it is.

Q. Does it have any use in the treatment of mild acne? A. Yes, it does.

Q. What about its use in the treatment of chronic eczema?

A. Well, chronic eczema is a big term. I mean we throw in a bunch—and I don't know how many diseases would go into that category as chronic eczema. Chronic eczema usually means an undiagnosed condition, the cause of which we don't know. In most of those instances the therapeutic lamp does relieve the patient and he gets rid of his eczema. Whatever causes it, you don't know, but it certainly is an adjunct, and in a good many of those cases will completely eradicate the condition.

Q. Does it have any use in the treatment of chronic psoriasis?

(Testimony of Dr. Floyd Roswell Parks.)

A. Yes. Chronic psoriasis is sometimes—well, that is the only way you can handle it. In the acute case, no. In a chronic case it is exceedingly beneficial.

Q. Does the light have any value in the treatment of varicose ulcers? [489] A. Yes.

Mr. Tolin: You may cross examine.

Cross Examination

By Mr. Lyon:

Q. How did you happen to use the product, Life Lite, personally, Doctor?

A. Well, this patient of mine that I have mentioned, a graduate of the Harvard College and Law School, whenever he had anything in the way of a medicinal question, always came to me to ask about it. Three years ago he was rather beside himself, and although he had had many suggestions to him about his youngsters, he came to me with the problem. I believe at that time the daughter was about four, and his wife was very much upset because the little girl did not get better, she seemed to go downhill instead of going uphill. He came to me and asked me if it would be possible to have some sort of a quartz lamp which would not be harmful and would be beneficial, and he mentioned the fact that he thought he knew of such a lamp.

I went and checked up the lamp, studied it and looked it over very carefully, and told him that I was very sure that if he carried out the sugges-

(Testimony of Dr. Floyd Roswell Parks.)

tions there, and enlarging upon the distance from the body to the skin, from the lamp [490] proper, so that there would be no likelihood of getting into trouble and suggesting the time, using a very small exposure, I thought that this particular lamp we are talking about would do the job, whereas some of our other bigger lamps might be dangerous.

Q. And when you speak of this particular lamp, what lamp do you mean?

A. The respondent's lamp.

Q. And which model?

A. That one—I think it was HC or H7.

(Thereupon Commission's Exhibit 9 was handed to the witness.)

A. This particular one here (indicating).

Q. That is Model H7, sold by the respondent, Ultra-Violet Products, Inc.?

A. Yes.

Q. That was a stand model?

A. Yes.

Q. That was the first time you had heard about it, about three years ago, when this patient of yours spoke to you about it?

A. Well, I had heard about these lamps before, but I had never really carefully checked into it. The fact that I knew this Mr. Bentley very, very well, and he is very much of a student, he teaches out at the City College, I felt [491] that I should really give some time and thought to checking it up, which I did.

Q. Now, you said that you had used an ultra-

(Testimony of Dr. Floyd Roswell Parks.)

violet light in your practice. Did you use an ultra-violet light prior to the time you were talking about? A. Yes, I have.

Q. What kind of a lamp did you use?

A. One of these Burdick lamps.

Q. What type of lamp was it?

A. Well, it is a big one.

Q. So far as its classification is concerned?

A. That particular lamp which I used in 1933 was a hot quartz lamp put out by the Burdick people. I think it cost about \$700, way beyond the realm of possibility of the ordinary person buying it.

Q. That is, the hot quartz type of lamp is a much more expensive type of lamp than the cold quartz? A. Well, that particular model was.

Q. As a matter of fact, all hot quartz lamps are more expensive; are they not?

A. I couldn't say as to that.

Q. And they are primarily designed for use in a physician's office?

A. The price has been reduced. That is where I used them. I think they are used also in health resorts and these [492] training offices, where they give you exercises, and then let you lie under the lamp, which is in the ceiling, and which gives out these various ultra-violet rays. Most all of such places have ultra-violet lamps now.

Q. You have been using this hot type of quartz lamp in your practice since 1933?

A. That is right.

(Testimony of Dr. Floyd Roswell Parks.)

Q. And you have continued to use that until the present time, have you?

A. I still have it there, as an adjunct, purely.

Q. That is the hot quartz lamp? A. Yes.

Q. Well, do you use the cold quartz type of lamp in your practice?

A. Well, I do and I don't. If I have a bad case of ringworm, as I say, one treatment will usually clear it up, whereas I can get the same result with this hot quartz in about four or five treatments. It takes longer usually with a hot quartz to produce the same effect as your cold quartz. Cold quartz is much more efficient.

The only reason that I don't have it in the office is mostly due to a limitation of space. It is just one more darned thing to have around. But I am going to get one, because certain things are much more efficiently treated with the cold rather than with the hot quartz, and it is a [493] matter of saving time.

Q. Is it not true that the hot quartz lamp is much more expensive than the cold quartz lamp?

A. I couldn't say. I am not—I couldn't say as to that. I think all quartz lamps have been reduced in price.

Q. I mean relatively so?

A. I don't know. I couldn't say.

Q. Anyway, you spent \$700 for the one you have been using?

A. Yes. That has been greatly reduced since that time.

(Testimony of Dr. Floyd Roswell Parks.)

Q. And you haven't a cold quartz lamp in your office at the present time?

A. No, I haven't. I usually send those patients to the hospital, where they have one. For instance, the physiotherapy department of the Hollywood Hospital, which is a very up to date place. I was in there with a patient not so long ago, and I made the remark that I wished I knew just what the difference between those two, the hot and cold quartz was, except for the fact of saving time.

Well, the head of the department said, "I am sorry, but I can't tell you the answer to that." He said, "We like the hot quartz for some things, and the cold quartz for other things. Some of our doctors come in and wish we had a hot quartz, and we tell them we only have the cold quartz, so I don't know what the answer is on that."

Q. The price of this Model H7 is \$130, is it not? [494]

A. I believe so. Something like that.

Q. And that is much less than the price you paid for the one you are using in your office?

A. Yes.

Q. But in spite of that, you did not buy any cold quartz lamp at all?

Mr. Tolin: That is objected to as argumentative.

By Mr. Lyon:

Q. Well, this was in spite of your personal opinion that the cold quartz lamp is more efficient? Is that correct?

(Testimony of Dr. Floyd Roswell Parks.)

A. I mean in certain things. I mean, it is impossible to have everything in the office. I am not a physiotherapist, as such. I use these various things, the ultra-violet, the infra-red, the red ray, the diathermy, the long and short waves, in the particular cases where they seem to fit, but I haven't seen fit to go into this so-called cold quartz, as I say, mostly because of the space it takes up. I can send them to the hospital and they can get the same result, or they can buy their own lamp, for that matter.

Q. Well, these patients that you send to the hospital for treatment with the cold quartz, do you have anything to do with the treatment there?

A. No, I don't, except that I tell them what the situation is, and that I want them to have such and such a treatment.

Q. That is, you advise the hospital to that effect, do you? [495]

A. The department, the physiotherapy department, which is a part of the hospital.

Q. I see. Then you just turn the patient over to them for their own treatment after that?

A. For treatment. They come back to me, of course.

Q. And you don't have anything personally to do with the treatment?

A. Other than to make the diagnosis and tell them what treatment I want them to give.

Q. Then your testimony with reference to the

(Testimony of Dr. Floyd Roswell Parks.)

effects produced by such a treatment is not under your personal supervision?

A. That is under my personal supervision.

Q. I mean the cold quartz lamp at the hospital.

A. I don't give the technical application, but I tell the technician what I want him to give, the time and so forth. Of course, they watch the time, they turn it on, and all that. I am not there to give that, but I tell them what I want them to do.

Q. And you never see the treatments given?

A. Oh, yes, I have seen some given. I don't go there for every treatment, no.

Q. Then you ask to have the patient sent back to you after the treatment?

A. Just to see—we always like to see the effect produced, [496] yes.

Q. Your testimony then has been based only upon the effects you have noticed after the treatment has been had in the hospital; is that correct?

A. My testimony is based upon the knowledge that I have, and the work I have done on the hot quartz work, specifically, in my own office and at the Boston City Hospital, where I first came in contact with them, back in 1924.

Q. Well, Doctor, the hot quartz is not in issue in this case. We are talking only about the cold quartz type of lamp. Do you understand that?

A. Yes, I do.

Q. And has the testimony you have given had

(Testimony of Dr. Floyd Roswell Parks.)

to do with reference to the effects given by the hot quartz lamp, as well as the cold quartz?

A. No, my testimony is mostly, on the questions you have asked me, with reference to the cold quartz.

Q. You say that you are not a physiotherapist?

A. Not principally, no, sir.

Q. You are in general medical practice, as I understand it?

A. That is correct.

Q. Have you specialized in any particular branch of medicine?

A. I am specializing in general surgery, yes, sir.

Q. In general surgery? [497]

A. That is right.

Q. Now, what experiments did you perform personally with reference to the cold quartz type of lamp, which induced you to be favorably impressed with it?

A. Well,—

Q. I believe you stated that about three years ago you performed some experiments or did something in connection with it?

A. No, I didn't say that. I didn't perform these experiments. I went around to the various physiotherapy departments of the various hospitals, and read all I could get to read on the subject. I didn't want to recommend the use of hot quartz in the home, because it is much more difficult to handle, it takes a lot more technical skill than does the cold quartz, so I couldn't recommend that; but I

(Testimony of Dr. Floyd Roswell Parks.)

found I could recommend the cold quartz on the basis of what I had learned.

Q. You didn't actually do any experimentation of your own? You simply made inquiries from different sources, is that it?

A. Yes. That is pretty well standardized, the use of the lamp.

Q. That is, you inquired of different hospitals where it had been used; is that it?

A. I saw some of the results, and so forth, talked to various men who are using it, and, as I say, I carried on [498] quite a research with the people who had used it.

Q. Those were mostly physicians, were they?

A. Doctors and physiotherapists in these various hospitals.

Q. How many patients have you personally treated with a cold quartz lamp?

Mr. Tolin: I think the question is indefinite, in that the doctor has testified that he has sent patients to hospitals for that treatment by their physiotherapy departments, and the question might be confusing as to those cases, whether they are included within it or whether you mean only those where he has personally applied the lamp.

By Mr. Lyon:

Q. As I understand it, you have never personally used the lamp at all?

A. Not the cold quartz. As I say, I don't have one in my office.

(Testimony of Dr. Floyd Roswell Parks.)

Q. And your testimony with reference to its use is based upon what you have heard from others?

A. Medical knowledge, which is from various sources where you can attack it.

Q. You spoke of the difference between a sun lamp and a therapeutic lamp. What, in your opinion, is the beneficial effect of a sun lamp, if any?

A. Well, I think it has a certain psychological effect. I went into that some time ago. The General Electric was [499] putting out such a lamp, and I wanted to give that to my patients, provided I could see that definitely it did some good. Well, frankly, on the knowledge that I have been able to gather, I would question its real value, other than in actual sunlight.

Q. A sun lamp is designed to produce effects comparable to that of natural sunlight?

A. I think so. They say it does more than that, but I can't see it.

Q. Well, in your opinion, is natural sunlight of any effectiveness?

A. Yes, it is. Of course, the benefits of a lamp is that you have it for 12 months in the year, and the sun, with its intense rays, you have for only relatively short periods of the year.

Q. I believe you stated that the sun lamp did not contain any ultra-violet rays. Was that your statement?

A. No, I didn't say that. I said that it contained relatively few by comparison with the therapeutic lamp.

(Testimony of Dr. Floyd Roswell Parks.)

Q. And the rays that it does contain include the ultra-violet rays?

A. It contains all the rays in the spectrum.

Q. They are a longer type of ray than the ultra-violet rays in a therapeutic lamp, are they not?

A. Well, ultra-violet light is at one end of the spectrum, [500] and your infra-red at the other end; one is relatively visible, and the others are not visible. Your ultra-violet are not visible in the pure sense of the word and are much more penetrating rays than the other parts of the spectrum. I don't know just what you are trying to get at there.

Q. Well, speaking with reference to the angstrom units, that is a measurement of unit, is it not?

A. Yes, sir.

Q. With reference to ultra-violet rays and also any other kind of rays?

A. The longer rays would be found, I would think, in your pure lamp, that is, your therapeutic lamp. Other than the sun, you mean?

Q. Yes, that is what I am talking about.

A. Yes.

Q. You mean the longer rays are found in the sun lamp rather than the therapeutic lamp; isn't that correct?

A. Well, your angstrom units are much greater in your therapeutic lamp. Now, what are you trying to get at? I don't just get it.

Q. Well, what is your idea of it, Doctor? Is it your idea that the shorter rays, the shorter ultra-

(Testimony of Dr. Floyd Roswell Parks.)

violet rays are found in the sun lamp or in the therapeutic lamp?

A. I would say the longer rays were found in your therapeutic lamp. [501]

Q. You have never made any study especially of physiotherapy?

A. Well, I have made studies, but that is purely a physical problem. They tell us what it is capable of, so many angstrom units per given period of time, and that is all I am interested in.

Q. Isn't it a fact, that is, isn't it a medical fact that lamps which emit rays of 2800 angstrom units or more are sun lamps, as distinguished from lamps emitting ultra-violet rays of 2800 angstrom units or less?

A. Well, your sun lamps would be the lower figure of your angstrom unit output, or whatever you want to put it, and the other lamps contain more.

The Witness: And that is a matter of physics. I mean, that is not so much medicine.

By Mr. Lyon:

Q. And that is not your specialty?

A. I am not a physicist personally, no. [502]

Q. What would you say would be the benefits to the skin of rays of 2540 angstrom units? What beneficial effects would there be on the skin?

A. Well, it would probably give a reddening of the skin, a blush.

Q. Is that a beneficial effect?

(Testimony of Dr. Floyd Roswell Parks.)

A. Yes, I think so. You get a certain tonic effect. You bring the capillaries to a greater capacity; that is, they are dilated. The blood is brought to the surface, and such as ordinary sunlight would give you the same effect.

Q. That would be the same effect as from ordinary sunlight?

A. I mean, that would be the same effect as from ordinary sunlight.

Q. That would be known as erythema, Doctor?

A. Yes.

Q. What other beneficial effects would there be in rays of that length?

A. Well, it would tend to raise the temperature of the body, which would produce a leukocytosis, an increase of the white cells, particularly the polymorphonucleic leukocyte cell.

Q. What other beneficial effects would there be?

A. That is about all. The matter of heat, as I said, raises your temperature. That is about all.

Q. There would be no benefit, then, so far as the vitamin D activation would be concerned? [503]

Q. There would be some, but that wouldn't be the biggest factor. You would only have the beneficial effect, so far as vitamin D is concerned, that sunlight, that is, the amount of sunlight or the spectrum would give you, so far as the ultra-violet end of the spectrum is concerned; and, of course, sunlight is made up of all of those various bars of light.

Q. We are talking of rays of 2540 angstrom

(Testimony of Dr. Floyd Roswell Parks.)

units. Is that the spectral range of the cold quartz lamp, do you know?

A. I believe that the cold quartz lamp is on the upper end of that, extends beyond 2500, that is, 2500 is relatively fewer.

Q. 2500 angstrom units is relatively what?

A. I mean, that is a small amount of angstrom units for the maximum.

Q. In your opinion, the cold quartz lamp would not have angstrom units of that spectral range; is that correct?

A. Well, it would to a lesser degree, yes.

Q. What would your idea of the spectral range of the cold quartz lamp be? What would be the length of the ultra-violet rays emitted by such a lamp?

A. Well, you would have a much greater range in your therapeutic lamp.

Q. And what would that range be?

Mr. Tolin: That is objected to on the ground that [504] this witness has not been examined on direct examination upon the physical aspects of this light, but only upon its use in therapeutics.

Mr. Lyon: Well, I think it is evident that he is not an expert along that line, so I will refrain from any further questions to that effect.

Q. Coming to those specific diseases that you talked about, Doctor, I believe you stated that the cold quartz lamp would have a beneficial effect, would be of beneficial aid in the treatment of bronchitis. Now, what would that beneficial aid be?

(Testimony of Dr. Floyd Roswell Parks.)

A. Well, you increase the resistance of the individual by stimulating the production of vitamin D, through bringing the blood to the surface of the body. That production of vitamin D is much greater in ultra-violet therapy as against what you would expect in some of the other forms, such as sunlight.

Q. What is bronchitis, Doctor?

A. An inflammation of the bronchial tubes.

Q. What is the treatment that you ordinarily use for that particular disease?

A. Well, it is mostly a combination of treatments.

Q. And the use of a cold quartz lamp would be simply an aid in such a treatment; is that correct? [505]

A. Just as an adjunct.

Q. Would it by itself be of any assistance in the treatment of such a disease, without anything else in addition to it? Per se, I mean?

A. You mean the lamp by itself?

Q. Yes, the ultra-violet lamp.

A. Cure the disease?

Q. Yes.

A. I don't know. I probably wouldn't try it just by itself.

Q. Upon what did you base your opinion that it would be a beneficial aid in the treatment of bronchitis? What experience have you had in the treatment of bronchitis with the use of such a lamp?

A. Well, in the chronic cases you are glad to

(Testimony of Dr. Floyd Roswell Parks.)

use anything, and that is the ones that I turn over to the physiotherapy department for help.

Q. That is, you haven't treated any of these bronchitis cases yourself?

A. That is, not myself with cold quartz, no, sir. I have sent them to the hospital to be treated, and often you send such a patient with bronchitis to the hospital to stay for a few days, and he gets a quartz treatment purely as an adjunct.

Q. And he gets a lot of other different treatments, in addition to the cold quartz, would you say, in the hospital? [506]

A. Well, you use various drugs, naturally.

Q. That is what I mean. A. And rest.

Q. There are several other things that are being done at the same time?

A. This is just an adjunct, that is all.

Q. In your opinion, you could not separate the value of one from the value of the other?

A. I say that you muster all the help you can get, no matter where you have to look for it.

Q. And there would be no way of telling just what part the ultra-violet ray would play in such a condition?

A. Well, it seems to have a very beneficial effect.

Q. I mean by that, Doctor, have you performed any experiments or had any experience in the treatment with and also without the use of such rays, in the treatment of bronchitis?

A. Well, some cases of bronchitis clear up very rapidly without much difficulty, whereas others are

(Testimony of Dr. Floyd Roswell Parks.)

very persistent, more chronic, harder to eliminate. Those are the cases where you bring into play anything that you have ever heard of as being helpful.

Q. Hoping that one of them might help; is that right? A. Yes.

Q. But there would not be any way to tell which one did the work in case there was a cure? [507]

A. It would be difficult to estimate just which did which, but we do know it is beneficial. I have seen it too many times.

Q. What I am trying to find out is upon what you base your opinion that it has been beneficial. Have you seen any cases that have been cured?

A. Have seen good results.

Q. (Continuing) Or where you attribute the results to the lamp?

A. With a persistent case of chronic bronchitis, which would not clear up with ordinary means, using a quartz lamp is certainly a help to shorten the condition. It shortens the disease. Just how, I don't know. It just does.

Q. And you say you have had cases like that in your own experience? A. Yes.

Q. Upon what do you base your opinion that the use of cold quartz light would aid in convalescence?

A. Well, there, again, seeing is believing, seeing is the best judge. It does tend to raise your resistant factors in the body, and I believe it helps to create an appetite which might be lost in the illness. In surgical cases, in fracture cases and things

(Testimony of Dr. Floyd Roswell Parks.)

like that, I know that it is a great help. I have seen that with the results that we have obtained. As I say, seeing is believing, and seeing [508] is the best judge. If you did not get your results, you would not use it.

Q. How did you know, Doctor, that the ultra-violet lamp caused those results?

A. Well, again the way you use anything is to go around and see what other people are doing, the results they obtain, what they tell you, what you can read, then you use it yourself and you are convinced with the results that you obtain.

Q. You say that you haven't used this yourself in your own practice?

A. Not in my office, no, sir. It has been at the hospital and through these lamps that we have put out to the patients, where they couldn't afford the hospitalization or where it did not seem advisable.

Q. In all these cases that you have spoken about, the cold quartz lamp was used simply as an adjunct in the treatment; is that correct?

A. Well, in certain cases specific treatments—your ringworm responds very rapidly. Usually one treatment will eliminate it. That is fairly common out here with dogs and cats around. I usually don't bother with it at the office. I just send them to the hospital and one shot is enough.

Q. That is, the ringworm cases that you have had you have [509] not treated yourself, but have sent to the hospital?

(Testimony of Dr. Floyd Roswell Parks.)

A. I am not doing it now, since I have seen the effects with cold quartz.

Q. What are you doing now?

A. Sending them to the hospital. As I say, they clear up with one exposure, as a rule.

Q. That is, you send them to the hospital with instructions to have the cold quartz used on them?

A. That is right.

Q. Now, as I understand it, you haven't personally performed any of these experiments or done this work yourself. This has all been in the hospitals? A. With reference to what? [510]

Q. Well, all of the other diseases you speak about, athlete's foot, acne, eczema, psoriasis.

A. Well, I have had several patients that have this lamp at home, and athlete's foot practically everybody has, and I find they have used that with benefit. I don't even attempt to have those patients come to my office, that is, except for the one time to make the diagnosis. It is relatively a chronic disease and rather persistent, and your cold quartz does help that. The hot quartz I have found absolutely to be worthless, so far as that is concerned. I mean, it takes too long to eliminate it.

In passing, I might say that I had a star from the University of Pennsylvania football team, who had a large area of a skin condition on his tibia, which I diagnosed as athlete's foot. It had been spreading and he had had it for a number of months. I thought cold quartz would do it some

(Testimony of Dr. Floyd Roswell Parks.)

good, so I sent him to the hospital and in two treatments the darned thing was completely eliminated.

Q. What kind of treatments?

A. With cold quartz.

Q. Was there anything else used at that time?

A. I didn't use anything else. He had used everything under the heaven, countless things, with no effect.

Q. Isn't it a fact that other things are usually used in addition to ultra-violet rays in such a condition? [511]

A. I don't see any point in using them. I mean, you just use irritating substances, and your cold quartz lamp will do that very thing and do it much more effectively.

Q. Now, in your opinion, do the ultra-violet rays of a cold quartz lamp penetrate beneath the surface of the skin?

A. I don't think they do.

Q. You think they would be just on the surface?

A. Through the layers of the skin they will go, but they won't go beyond that.

Q. Well, do you mean by that all of the layers of the skin, or just the superficial layers?

A. Well, down to the so-called sub-strata layer.

Q. Most of the other diseases and conditions we have been talking about, such as acne, eczema, psoriasis, and so forth, are mostly conditions affecting the skin, are they not, below the superficial layers?

A. I wouldn't say so.

(Testimony of Dr. Floyd Roswell Parks.)

Q. Would you say they were diseases affecting the superficial layers of the skin?

A. *The* affect the skin. The skin is found in many layers, depending upon which classification or which anatomist you want to follow. You divide it up into these various layers. The skin diseases, of course, are those diseases which are relegated to the skin, and in speaking of skin problems such as acne, why, it is usually the outer layers [512] of the skin. That may extend down or does extend down to the follicle cells, which are present in really the outer two-thirds, dividing up those layers into three groups, three parts.

Q. Isn't it a fact that most of those diseases that you have mentioned affect the underlying layers of the skin, that is, below the surface?

A. Well, some of the so-called deeper layers. As I say, all of those diseases which we have mentioned affect one or more layers of the skin. They may affect the superficial half of all layers. That is a microscopic analysis purely that we are mentioning now.

Q. You are not a dermatologist, Doctor?

A. No, sir.

Q. You have never made any particular study of skin diseases, have you, Doctor?

A. I thought I was a good dermatologist at one time. That was when I was a student.

Q. But you have never done any special work along that line?

A. No, no special work, no, sir.

(Testimony of Dr. Floyd Roswell Parks.)

Q. Most of your skin cases you send to be treated by dermatologists, do you?

A. That is right.

Q. And you have never per se treated any of the conditions [513] that you have mentioned in your testimony?

A. That is not right, no, sir. I have treated them. The only case that you have mentioned or that somebody mentioned, I guess it was in the first part of the discussion, was this lupus erythematosus, which is a rare thing, and I have seen two cases in my lifetime. If I had that come in, I would send it to the best skin man or several skin men that I could think of. But the other things you have mentioned are relatively common diseases and any doctor comes in contact with them.

Q. Have you treated them personally yourself?

A. Yes, sir.

Q. But not with the cold quartz lamp?

A. Not the cold quartz lamp.

Q. What treatment did you give for those particular diseases?

A. Well, treatment changes from time to time, and as I say, whereas I used to treat some of these things myself, now I send them directly to the hospital for the physiotherapist to handle with his instruments, so to speak. If it is in a case which is going to be of long standing and the patient for one or more reasons could profit by using some sort of a lamp, then I have recommended this lamp that we are talking about in the home.

(Testimony of Dr. Floyd Roswell Parks.)

Q. What medical associations do you belong to, Doctor? [514]

A. The Los Angeles County, the State of California, the American Medical, and the various surgical groups, both the Los Angeles Surgical group and the American College of Surgeons.

Q. Are you familiar with the Council of Physiotherapy of the American Medical Association?

A. Yes. I see their writings in the American Medical Association Journal that comes out every week.

Q. Are you familiar with the distinction which is made by that Council between therapeutic lamps and sun lamps?

A. Well, yes, I think I am, in a general way.

Q. What is that distinction?

A. Well, the sun lamp does not filter out or produce the ultra-violet rays exclusively or almost exclusively, whereas the ultra-violet therapeutic lamp tends to do just that thing. [515]

Redirect Examination

By Mr. Tolin:

Q. How long have you had your hot quartz lamp? A. Since 1933.

Q. At that time was the cold quartz well known in the market?

A. No, sir. It was just barely coming in. We didn't know [519] much about it at that time. [520]

Mr. Tolin: The respondent has now closed its case, but at the time the first witness for the Com-

mission was on the stand, Mr. Warren, the cross examination was deferred. I would like to conclude that cross examination of that witness now.

THOMAS S. WARREN

was thereupon recalled as a witness on behalf of the Commission, and having been previously duly sworn, testified as follows:

Cross Examination

By Mr. Tolin:

Q. Mr. Warren, you testified on direct examination that you held most of the stock of the respondent corporation. Is that correct?

A. That is true. [521]

Q. Does the corporation have a board of directors?

A. Yes. The board of directors meet, well, it depends upon the conditions, but I would say on the average of three times a year.

Q. Is the active management of the corporation directed by that board of directors?

A. Not the active management, no; but the general policies are discussed and suggestions are made, and I attempt to follow the policies and program as we work out at the meeting.

Q. Are those directors persons who are financially interested in the company?

A. All but one.

Q. How many do you have on the board?

(Testimony of Thomas S. Warren.)

A. Five.

Q. Are you a board member yourself?

A. Yes.

Q. You have heard of corporations that are one-man corporations, in which one man simply incorporates his business. This is not that kind of a corporation, is it? A. No.

Q. When did you first work with ultra-violet light?

A. I first started working with ultra-violet light in 1929.

Q. Where was that?

A. That was with the Metlox Corporation, and it was at [522] their factory at that time on North LaBrea Avenue in Los Angeles.

Q. Prior to that time did your study ultra-violet light?

A. No, no real study of it prior to that time. Since that time—well, at that time I was placed in charge of a department which they expected to make an important part of the company, and I was to develop the ultra-violet lamp department, and that I proceeded to do.

Q. Had you had any training in college before that?

A. I had a thorough course in physics in college, which included light, and when I took over the building up of this department I went to Cal. Tech., with the lamps which we made in our laboratory, and I had them analyzed by Dr. Neher, who is Dr. Millikan's first assistant, and also Dr. Beeler.

(Testimony of Thomas S. Warren.)

We checked the wave lengths, made photographs of the wave lengths, checked the intensity of the light at various wave lengths.

Q. You have mentioned "Cal. Tech." Do you mean the California Institute of Technology?

A. Yes.

Q. So whenever we have occasion to say the California Institute of Technology in the evidence here we will simply say "Cal. Tech.," as a matter of using a convenient abbreviation.

A. Right.

[523]

Q. You say that you took some tube to certain professors at Cal. Tech. Was that the tube that is used in your product, the Life Lite?

A. That is a tube identically the same. It was a cold quartz type of tube lamp. We not only took it to Cal. Tech., but we took it to certain laboratories in Los Angeles, where we had bactericidal tests made with it, and we had at that time about six or eight doctors using the lamp in their practice, to determine the results from the use of it, so that we would have first hand information, which we could compile into the literature which we were going to compile and which we later did compile.

Q. When you say "we", whom do you mean?

A. I mean the company.

Q. The Metlox Corporation?

A. The Metlox Corporation.

Q. By whom you were then employed?

A. That is right.

Q. And by the tube, you mean the tube that was

(Testimony of Thomas S. Warren.)

used by the Metlox Corporation in their ultra-violet light? A. Yes.

Q. How long were you with the Metlox Corporation in that ultra-violet work?

A. I was with them until July of 1932.

Q. Where did you go from there, so far as employment is [524] concerned?

A. I started the Ultra-Violet Home Products Company, which was at that time my own business.

Q. That was the predecessor in interest of the respondent corporation? A. That is right.

Q. Did you at that time start to manufacture and sell to the public a light that is identical to your present Life Lite, in so far as the tube in it is concerned?

A. Yes. The tube at that time was a little different in shape, used a little different current than what was commonly called the cold quartz lamp, and at that time everything was new and we were developing, and the tube that we used in the little Model A Life Lite lamp was only about six inches long and used 100 milliamps instead of the usual 25 or 30, which is customary in a cold quartz lamp or was at that time, so to be absolutely certain that there were no wave lengths being formed different than what we had been accustomed to in the standard cold quartz lamp, I took the Model A hand lamp to Dr. Leighton.

Q. Do you mean your ultra-violet Life Lite?

A. I mean the Life Lite Model A hand lamp.

Q. Yes.

(Testimony of Thomas S. Warren.)

A. I took it to Pomona College where Dr. Wesley Leighton was in the chemical department there, and he had been doing [525] a good deal of research work with ultra-violet radiation, and I worked with him taking the measurements and the readings of the ultra-violet output of the Life Lite Model A lamp. These I have a very complete record of, and they have checked exactly with the standard output of the cold quartz type lamp.

Q. The Dr. Leighton to whom you have just referred is not the Dr. Leighton who testified in this hearing?

A. No, a brother.

Q. What was his connection with Pomona College at that time?

A. He was professor of physical chemistry.

Q. I refer now to Commission's Exhibit 41-A, which is a letter on the letterhead of Ultra-Violet Products, Inc., addressed to Mr. P. B. Morehouse, Director of the Federal Trade Commission, Washington, D. C., in which you give the electrical output and input by lamp of various models of the lamp. Where did you get the information that is contained in that letter, which I now show you to refresh your memory?

(Handing document to witness.)

A. That information was secured from my electrical engineer, and also from tests in our own shop with a wattmeter.

Q. Did you obtain any of that information in your work with Dr. Leighton at Pomona College?

(Testimony of Thomas S. Warren.)

A. Some of it is based upon results of work there, but not [526] specifically regarding these tests.

Q. I show you a paper, which I will ask the reporter to mark as the respondent's exhibit next in order, and ask you to look at it and tell me if you know what it is.

(The document referred to was marked "Respondent's Exhibit No. 7" for identification.)

A. This is the original chart showing the readings of the intensity of the various wave lengths of the Life Lite Model A lamp, made by myself and Dr. Wesley Leighton.

Mr. Tolin: I offer it in evidence as the respondent's next exhibit. [527]

(The document heretofore marked "Respondent's Exhibit 7" for identification, was received in evidence.)

By Mr. Tolin:

Q. Now, just what work did Dr. Leighton do on the Life Lite [528] tube that you are using at the present time?

Mr. Lyon: That is objected to as calling for hearsay testimony.

Trial Examiner Reardon: What was that question?

(The question was read.)

Trial Examiner Reardon: You may testify to what you actually saw him do when you were present, and not anything else.

(Testimony of Thomas S. Warren.)

The Witness: He and I worked together. We took the standard tube of the Model A Life Lite lamp, using a standard transformer that put about 100 milliamps current through the tube, and we measured the ultra-violet output.

Trial Examiner Reardon: That is what you saw the doctor do?

The Witness: I worked with him. We did it together.

Trial Examiner Reardon: I see. All right.

The Witness: I fastened the tube in the section and we got it close to the microgalvanometer slip, and he adjusted the slip to get the more accurate readings. He did that because he was more familiar with it than I was, and I helped him take the readings from the galvanometer.

By Mr. Tolin:

Q. What work did Dr. Neher do in your presence, with respect to the tube you are now using in the Life Lite?

A. Dr. Neher did exactly the same work in the same way [529] at Cal. Tech. here previously, by using the standard small board, eight to nine millimeter quartz tubes, which had a current passage of about 25 to 30 milliamps, and the reason I made the later test was to find out if the higher current raised the wave length or altered in any way the ultra-violet output from the cold quartz type lamp.

Q. Referring to Commission's Exhibit No. 2, this red caution card, where did you get the material that you used in composing this card?

(Testimony of Thomas S. Warren.)

A. I got that material from a Burdick quartz lamp, and I have been told that that was——

Mr. Lyon: Just a minute. I object to what he was told.

Trial Examiner Reardon: Yes. You can't say what you were told.

The Witness: All right. That is where I got it.

By Mr. Tolin:

Q. You have identified and there has been introduced in evidence here several instruction cards with respect to the Life Lite. Referring to Commission's Exhibit 7, Commission's Exhibit 6, Commission's Exhibit 1, Commission's Exhibit 5, Commission's Exhibit 3, and Commission's Exhibit 4, where did you obtain the information that is set forth on these exhibits?

A. I obtained that information from my contact with the [530] physical therapists in several different hospitals in Los Angeles, and from a very broad, I think, reading of the subject of ultra-violet light. [531]

Q. Have you read the available literature regularly during the years you have been working with ultra-violet light

A. Yes, I have, very consistently.

Q. Can you tell us whose works you have read respecting [540] ultra-violet light?

A. Yes. I have read the books by Russell and Russell. I have read the books by Dr. Rosewarne, Dr. Humphreys. I have read the book on ultra-

(Testimony of Thomas S. Warren.)

violet light by Dr. Plank. I have read the book on ultra-violet light by Ellison and Wells. I have read the compilation of the reports on ultra-violet light by Dugan. I have read the book on ultra-violet light and vitamin D by Blunt and Cowan.

I have read the parts of the book relating to ultra-violet light by Dr. Kovacs and Dr. Krusen, and there are two or three others I don't recall right now on physical therapy and skin diseases.

Q. Have you read any of the writings of Dr. Hibbins on that subject?

A. I have read a great many articles in magazines, including the one by Dr. Hibbins.

Q. Which magazines do you refer to?

A. I refer to medical magazines primarily. Occasionally, a scientific magazine contains good information on the use of ultra-violet light.

Q. Well, "medical magazines" is a broad subject.

A. Specifically, I refer to the Archives of Physical Therapy, X-ray, Radium, and the Journal of the American Medical Association.

Q. Have you drawn upon material which you have found there [541] as the source material upon which to base your literature?

A. I certainly have.

Q. Now, how long is it that you have been vending Life Lites?

A. The Life Lite lamps were first put on the market in November, 1932. [542]

THOMAS S. WARREN

was thereupon called as a witness for the respondent, having been previously duly sworn, testified as follows:

Direct Examination [545]

By Mr. Tolin:

Q. Do you rent these lights or are they all sold outright to the user?

A. We rent probably 90 to 95 per cent of the lamps before they are sold.

Q. You mean by that, that you sell second hand lamps or what is the custom with respect to rental?

A. We rent the lamps, and allow the rental to apply towards the purchase price, and our experience is that between 40 and 50 per cent of the lamps that are rented, or probably about half go into sales. The other lamps come back and we either re-rent them for a period of time or they may later be sold as a used lamp.

Q. You mean that about 45 per cent of the lamps that are rented are purchased by those original renters? A. That is right.

Q. Do you believe that the price of the lamp has any qualifying effect upon the type of user or the market to which your article is directed?

A. A very definite one.

Mr. Lyon: Just a minute. That is objected to as calling for an opinion and conclusion of the witness, a matter [546] on which he is not qualified to speak as a witness.

Trial Examiner Reardon: I sustain the objection. [547]

(Testimony of Thomas S. Warren.)

Q. What are the prices at which your lamps have been sold during the year 1940?

Trial Examiner Reardon: You are talking about this type of lamp?

Mr. Lyon: That is objected to as immaterial.

Trial Examiner Reardon: Objection overruled. Specify the lamp and give the prices.

The Witness: The prices of the lamps are: They are sold at, begin at \$49.50 for the Budget Model, \$60.00 for the Model A Life Lite, \$75.00 for the Deluxe Model.

By Mr. Tolin:

Q. Deluxe model what?

A. Life Lite. (Continuing) \$84.00 for the Universal model Life Lite; \$130.00 for the Model H7 Life Lite.

Q. Are those prices still in effect?

A. The prices are current today. [550]

(Whereupon at 3:40 o'clock P.M., June 11, 1941, the hearing was adjourned sine die.)

[554]

CERTIFICATE

This is to certify that the attached proceedings before the Federal Trade Commission in the matter of: Docket No.—4407. Case Title—Ultra-Violet Products, Inc. Place—Los Angeles, California. Date—June 11, 1941, were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

ETHEL E. FISHER & ASSOCI-
ATES, INC.,

Official Reporters.

By D. MacMILLAN,

Assistant Secretary.

FEDERAL TRADE COMMISSION

4492 COM. DIVISION 5 EXHIBIT No. 1
 THE MATTER OF *Ultra Violet Products*
 vs. *James*
 DEFENDERS
 JAMES J. JAMES

**MODEL A
 WITH QUARTZ TUBE**

**Operates on 110-120 Volt Alternating Current,
 50-60 Cycles**

**CAUTION: Goggles must be worn to protect the eyes
 from sunburn all the time the light is on.**

This lamp is to be operated from 110-120 Volt Current, 50 or 60 cycles. This is the ordinary house current. Do not plug the cord into a wall current outlet as the tube will not light and the transformer will overheat and burn out.

When the lamp has been plugged into the proper current the light is turned on by means of the automatic time switch. Turn the pointer of the switch slowly but firmly to the right. By the time the pointer reaches the number 3 on the dial, one or two clicks will be heard and the switch is ready for setting to the proper interval. To set for a one minute interval the pointer must then be returned to number 1. To set for a longer interval the pointer is advanced to the point desired. The end of time for which the lamp will burn is indicated by the number opposite the tip of the pointer. At the end of the time set the light will automatically turn off.

Directions for Use

Goggles are furnished with every lamp and it is vitally important wear them as the ultra-violet rays will sunburn unprotected eyes which they then inflamed and painful but which causes no other harm injury.

Uncover the portion of the body to be exposed, as the passage of ultra-violet through clothing is very limited.

Best results may be expected if your physician is consulted concerning frequency and length of treatment. This particularly applies to infants and children. Your physician is the proper guardian of your health.

LIFE LITE ULTRA-VIOLET LAMP

The ultra-violet rays are generated in the tube. These rays are visible. The visible light that you see from the tube is not ultra-violet. It has little if any therapeutic effect. It is only the invisible ultra-violet which has the chemical (tactile) effect on the body cells. It forms Vitamin D, produces erythema (sunburn), and has a bactericidal action.

TREAT THE ABDOMEN

The ultra-violet rays have very slight penetration and for this reason it is desirable to treat that part of the body in which the blood is closest to the surface. Best results are obtained by treating the abdomen and chest areas because 70 per cent of the blood that enters the skin capillaries comes to the surface in these areas. It is advisable to take treatments in a warm room, as the blood will be closer to the surface of the body than when exposed to a chilly temperature. Under these conditions it is possible to receive a much better result than if the cold air is striking the skin and causing the blood to recede into the deeper tissues.

TYPES OF PEOPLE

Blondes and brunettes react differently to the ultra-violet. A brunette will usually require longer exposures while the fair-skinned blonde usually reacts readily. Age must also be considered; the very old and very young demanding greater caution. Children up to four or five should require shorter treatments and it is best to give the treatments in the morning. Some adults also find it preferable to take treatments in the morning rather than in the evening because of the stimulative effect of the rays.

TREATMENTS

For a general body sunbath: Turn the lamp on for one minute, hold the lamp about one-half inch from the skin and pass the lamp over the chest and stomach. One or two minutes distributed over the chest and stomach is enough for the first treatment. Infants, and young children, or very fair-skinned adults should be started at from one-quarter to one-half of the above exposure times. The time may be increased one minute each day until a light pinkish flush of the skin is obtained, which will show up about six hours after the treatment. Once the desired reaction is established, continue the daily treatments with this same length of time as long as the reddening continues. If the skin becomes accustomed to the rays the time may be increased until the desired effects are obtained.

KEEP THE LIGHT MOVING

Keep it moving slowly over the body all the time. This gives an even distribution of the rays and prevents spot sunburning. Never give a long enough treatment to get an extreme reaction; if you should, allow an interval of three or four days before the next treatment. One person may receive the beneficial effects of the ultra-violet rays in a two-minute or three-minute treatment, while another person will require a six-minute or seven-minute treatment over a selected area, such as the abdomen and chest. It is obvious that it is not the length of time that determines the treatments, but the required reaction through an amount sufficient to produce the slight reddening of the skin.

It is important to use the lamp always at the same distance from the skin; for the intensity is greatly affected by a change in distance because the intensity varies inversely as the square of the distance.

Erythema—is the sunburn which appears 4 to 6 hours after the ultra-violet treatment. It will last from 12 to 36 hours and is usually followed by a slight peeling of the skin.

CLEANLINESS

Be sure to remove all ointments or salves before treatments, as the ultra-violet light does not penetrate very deeply, scarcely one-sixteenth of an inch; and so all surfaces should be as clean as possible.

CLEAN TUBE AND REFLECTOR

Keep the tube as clean as possible at all times. Use cleaning solvent or alcohol to keep the tube and reflector clean. Dust, grease, or finger prints will greatly reduce the intensity of the ultra-violet rays coming from the tube.



COMMISSION'S EXHIBIT No. 2

[Printer's Note: Commission's Exhibit No. 2 is a tag reading as follows:]

The warning label on this unit is attached as required by the recent Federal Food and Drug act.

There has been no change in the construction, operation or use of this apparatus.

(Reverse side)

Caution

To be used only by or on the prescription of a physician fully licensed and qualified by training and experience in the use of ultra-violet radiation.

A survey of accepted medical literature indicates that treatment of certain pathological conditions with ultra-violet radiation may be harmful.

In those conditions in which treatment is not contra-indicated, the physician will consider the type and extent of pathology present, and make such modifications of treatment as may be indicated.

Treatment may be contra-indicated in the following conditions:

Active and progressive pulmonary tuberculosis.

Advanced heart disease without compensation or myocarditis in the aged.

Advanced arteriosclerosis.

Gross renal or hepatic insufficiency.

Certain types of generalized dermatitis.

Acute or chronic nephritis.

Diabetes, hyperthyroidism and photosensitization.

Do Not expose the eyes to the direct light from this lamp. Wear suitable goggles.

ULTRA-VIOLET PRODUCTS, INC.

5205 Santa Monica Boulevard

Los Angeles, California

Form R-12

SPECIAL BOARD OF INVESTIGATION

PUBLISHED ADVERTISEMENTS

Aug
(Examiner)

10/3/39
(Pre. Rev. Date)

Los Angeles Examiner
(Publication Name)

(Examiner)

(Pre. Rev. Date)

9/10/39
(Date of Issue)

Ultra-Violet Products Co. Sec 7 p. 12
(Name of Advertiser) (Page No.)



FEDERAL TRADE COMMISSION

Case No. *4407* COMMISSION'S Exhibit No. *10*

IN THE MATTER OF *Ultra-Violet Products*

DATE *7/26/39* WITH *James*

REPORTER *James*

ETHEL E. FISHER & ASSOCIATES, INC.

63

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SPECIAL BOARD OF INVESTIGATION

PUBLISHED ADVERTISEMENTS

Aug
(Examiner)*6/6/34*
(Pre. Rev. Date)*Health Culture*
(Publication Name)

(Examiner)

(Pre. Rev. Date)

6/39
(Date of Issue)*Ultra Violet Products, Inc.*
(Name of Advertiser)*62*
(Page No.)**(Keep Your SKIN Clear)**

infections, etc., safely, quickly, and easily right in your home. Q2's Life quarts ultra violet lamps heal most skin diseases and insure that much sought-after clear healthy skin to the skin. Lamps sold or rented anywhere in the U. S. A. Write for folder HC-25.

ULTRA VIOLET PRODUCTS INC.
4155 Santa Monica Blvd. — Los Angeles, Calif.

FEDERAL TRADE COMMISSION

Docket No. *4407* COMMISSION'S Exhibit No. *11*IN THE MATTER OF *Ultra Violet Products*v. *THE* *6/18/41* *Y. H. S.* *James*F. T. C. v. *James*
F. T. C. v. *James*
F. T. C. v. *James*

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Dental X-ray Machine
 X-ray Machine. Costs nothing
 to try. Can be given away to
 anyone who sends a check for
 \$1.00. Guaranteed Laboratory
 Co. Dept. 10

EARTH-LITE

Ultra-violet rays normalizing cream

Increases vitality, and helps meet
skin diseases. Good for the skin and for
home dermatitis. Bantel or Bantel.

ULTRA-VIOLET PRODUCTS, INC.
DEPT. E-26

5136 Santa Monica Boulevard
Los Angeles, California

Phone NO. 3171

DEAFNESS

is solved! Every deaf person knows that if you are deaf learn about our Artificial Invisible Ear System. Wear with comfort continually. No wires, battery or head piece. Nothing to put out of order. Inexpensive.

4407 Ultra-Violet Products
5/24/44 Waver
Yellow

(One or the other of these sets have been published con-
tinuously in the L. A. Group Examiner since February, 1939.

is your PROOF of advertisement to appear in

JUN 1939

Issue of HEALTH CULTURE

IMPORTANT HEALTH CULTURE

that we receive corrections with O. K. by MAY 15 1939
Otherwise it is understood that ad will appear as shown.

1133 Broadway, New York, N. Y.

Keep Your SKIN Clear

Rad. your skin of acne, eczema, Psoriasis, sores, ulcers, infections, etc. safely, quickly, and easily right in your home. Life Lite quartz ultra violet lamps heal most skin diseases and impart that smooth smooth-after clear healthy tone to the skin. Lamps sold or rented anywhere in the U. S. A. Write for folder HC-55.

ULTRA VIOLET PRODUCTS INC.
5116 Santa Monica Blvd. Los Angeles, Calif.

MAY 12 1939
5739

FEDERAL TRADE COMMISSION

Booklet No. 1447 COMMISSIONER'S Exhibit No. 15

IN THE MATTER OF Ultra-Violet Products

DATE 5/11/39 WITNESS G. H. Fisher

REPORTER J. H. Fisher
F. H. F. FISHER ASSOCIATES, INC.

RECEIVED
SEP 6 1939
RADIO AND PERIODICAL
DIVISION

72

A 6

COMMISSION'S EXHIBIT No. 16

Copy of Advertisement appearing in May, 1939
issue of Health Culture

HEALTH LAMPS

Quartz ultra violet rays normalize body chemistry!.
Life Lite rebuilds your resistance to colds, increases
vitality, and heals most skin diseases. Ask for free
home demonstration or send for folder HC-24.
Rental or sales

Ultra-Violet Products, Inc.
6158 Santa Monica Boulevard
Los Angeles, California

[Stamped]: Received Sep. 6, 1939. Radio and
Periodical Division.

COMMISSION'S EXHIBIT No. 17

Copy of advertisement appearing in April, 1939
issue of Health Culture

Skin Diseases—Acne, Eczema, Psoriasis, sores,
ulcers, infections, etc. Life Lite quartz ultra-violet
lamps heal most skin diseases safely, quickly, and
easily at home. Lamps may be rented or purchased
anywhere in the United States. Write for Folder
HC-23.

Ultra-Violet Products, Inc.
6158 Santa Monica Blvd., Los Angeles, Calif.

[Stamped]: Received Sep 6, 1939. Radio and
Periodical Division.

COMMISSION'S EXHIBIT No. 21

Copy of Radio Program over KIEV, 850 Kilocycles, Cannon System, Ltd., Glendale, Calif.

Two weeks commencing 2/15/39

There's no substitute for the sun—but you can get almost the same benefits . . . with Life Lite . . . and it's health giving Ultra-Violet Rays . . . Get your quota of sun light with Life Lite . . . clear up most of your chronic skin disorders . . . build resistance against disease . . . AND relieve pain. Sufferers from Psoriasis, Acne, Eczema, Ulcers, and Impetigo, have obtained noticeable improvement after consistent use of Life Lite . . . It costs only \$8 to \$10 a month to rent a Life Lite . . . You may use it with the greatest safety, as it is clock controlled . . . easy and economical to operate . . . Rent one for \$8 to \$10 monthly . . . then, if you should desire to purchase it . . . the rental paid will be applied on the purchase price . . . For further information . . . or a free home demonstration write or phone Ultra-Violet Products Incorporated, 6158 Santa Monica Blvd., Los Angeles . . . Telephone Hollywood 31-71 for a free home demonstration (repeat)

[Stamped]: Received Sep. 6, 1939. Radio and Periodical Division.

[Endorsed]: No. 10218. United States Circuit Court of Appeals for the Ninth Circuit. Ultra-Violet Products, Inc., a corporation Petitioner, vs. Federal Trade Commission, Respondent. Transcript of the Record. Upon Petition to Review and Set Aside Order of the Federal Trade Commission.

Filed June 1, 1943

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10218

ULTRA-VIOLET PRODUCTS, INC., a corpora-
tion,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW AND SET ASIDE
ORDER OF FEDERAL TRADE COMMIS-
SION

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Your Petitioner, Ultra-Violet Products, Inc., a
corporation, respectfully shows:

I.

Petitioner is now, and at all times hereinafter mentioned was a corporation duly created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, and therein carries on the business of manufacturing and selling lamps which emit ultra-violet rays for therapeutic and other purposes.

II.

On the 7th day of December, 1940, Respondent Commission issued a complaint against Petitioner, alleging in substance, that Petitioner had disseminated by the United States mails and other means in commerce certain false advertisements for the purpose of inducing and which were likely to induce the purchase of one of Petitioner's products called "Life Lite", and had disseminated false advertisements for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase in commerce of said product, in violation of section 12 of the Federal Trade Commission Act (Title 15, section 52, U.S.C. 1940 ed.), and that said advertisements constituted unfair and deceptive acts and practices in commerce in violation of section 5 of said Federal Trade Commission Act (Title 15, section 45, U.S.C. 1940 ed) which said complaint was given Docket No. 4407.

III.

Thereafter Petitioner duly filed its written answer

to said complaint denying that the advertisements disseminated by Petitioner were false, admitting or denying other material allegations of said complaint, and alleging facts deemed by Petitioner material to the subject-matter of said complaint.

IV.

Thereafter a hearing was held before a trial examiner designated by Respondent Commission, and certain further proceedings were had, whereupon Respondent Commission took said matter under submission.

V.

Thereafter Respondent Commission caused to be served upon Petitioner, on the 13th day of June, 1942, an instrument in writing, dated June 8, 1942, designated "Findings As to the Facts and Conclusion", in said Docket No. 4407, a copy of which said instrument is hereunto annexed, marked "Exhibit A", and hereof made a part, and caused to be served upon Petitioner at the same time an instrument in writing, dated June 8, 1942, designated "Order to Cease and Desist", in said Docket No. 4407, a copy which last-mentioned instrument is hereunto annexed, marked "Exhibit B", and hereof made a part.

VI.

The findings as to the facts, set forth in said "Exhibit A", and in particular the findings contained in paragraphs numbered Six, Seven and Nine thereof, are without substantial support in the evidence received by Respondent Commission

and its trial examiner in the proceedings aforesaid, but are contrary to such evidence, and are arbitrary, capricious and unlawful; the "Conclusion", set forth in said "Exhibit A", is not supported by the findings or by the evidence; the "Order to Cease and Desist", "Exhibit B" aforesaid, and in particular subparagraphs (a), (b), (c), (d), (f), (g), (h), (i), (j), and (n) of paragraph 1, and paragraph 3 thereof, are not supported by the record before Respondent Commission in said proceedings and are beyond the authority and jurisdiction of Respondent Commission.

Wherefore your Petitioner prays that this Honorable Court review the proceedings aforesaid, and set aside the aforesaid "Order to Cease and Desist", or modify the same in such respects as to the Court may seem proper and consonant with law.

HENRY McCLERNAN

Attorney for Petitioner

State of California

County of Los Angeles—ss.

Thomas S. Warren, being first duly sworn, deposes and says: that he is the President of Ultra-Violet Products, Inc., the Petitioner in the above-entitled action; that he has read the foregoing Petition, and knows the contents thereof; and that the same is true of his own knowledge, except as to matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

THOMAS S. WARREN

Subscribed and sworn to before me this 10th day of August, 1942.

[Seal] HELEN BURLAND

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires March 21, 1943.

[Endorsed]: Filed Aug 11, 1942

[Title of Circuit Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH PETITIONER INTENDS TO
RELY AND DESIGNATION OF PARTS
OF THE RECORD WHICH IT THINKS
NECESSARY FOR THE CONSIDERATION
THEREOF

To the Clerk of the above-entitled Court and to
Respondent, Federal Trade Commission:

The following is a concise statement of the points
on which the Petitioner, Ultra-Violet Products,
Inc., intends to rely, on the review, and designation
by the Petitioner of the parts of the record which
it thinks necessary for the consideration thereof,
to-wit:

Concise Statement of Points on Which Petitioner
Intends to Rely

(For convenience, the Respondent, Federal Trade
Commission, is hereinafter designated "Commis-
sion"; the "Findings as to the Facts" made by the

Commission on June 8, 1942, and copy of which is contained in "Exhibit A" attached to the Petition on file herein, are hereinafter designated "Findings"; the "Order to Cease and Desist" issued by the Commission on June 8, 1942 and copy of which is attached, as "Exhibit B", to the Petition on file herein, is hereinafter designated "Order".)

1. The following portion of the Findings of the Commission, to-wit:

The benefits afforded by respondent's lamp to the skin and to the general health cannot properly be compared with those afforded by natural sunlight because of the wide variation between the rays emanating from the two sources,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents that Petitioner's therapeutic lamp known as "Life Lite"

affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight

was not supported by the record before the Com-

mission and was beyond the authority and jurisdiction of the Commission.

2. The following portion of the Findings of the Commission, to-wit:

While ultra-violet rays of the wave length emitted by [Petitioner's] lamp possess bactericidal properties, such properties are effective only in those cases where the infection sought to be attacked is limited to the surface of the skin. The rays are incapable of penetrating the surface of the skin and destroying bacteria or fungi present below the surface. The use of [Petitioner's] lamp therefore does not constitute a cure or remedy or a competent or adequate treatment for such conditions as * * * ringworm, athlete's foot, acne, eczema, psoriasis * * *, all of which are due to causes existing below the surface of the skin,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp constitutes a cure or remedy or a competent or adequate treatment for * * *

ringworm, athlete's foot, acne, eczema (or)
psoriasis * * *

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

3. The following portion of the Findings of the Commission, to-wit:

In the case of sores and ulcers, the lamp may possibly stimulate the healing process but only in those instances in which the infection causing the condition is confined to the surface of the skin,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except insofar as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin

was not supported by the record before the Com-

mission and was beyond the authority and jurisdiction of the Commission.

4. The following portion of the Findings of the Commission, to-wit:

The lamp possesses no therapeutic value in the treatment of * * * bronchitis, * * *

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp possesses any therapeutic value in the treatment of * * * bronchitis * * *

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

5. The following portion of the Findings of the Commission, to-wit:

It is incapable of building up in the body resistance to disease,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end

thereof was beyond the jurisdiction of the Commission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp builds up in the body resistance to disease

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

6. The following portion of the Findings of the Commission, to-wit:

It does not produce any chemical reaction with respect to the blood stream * * *

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp * * * produces any chemical reaction with respect to the blood stream * * *

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

7. The following portion of the Findings of the Commission, to-wit:

It is incapable of building up the body's resistance to infection, * * *

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp builds up the resistance of the body to infection * * *

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

8. The following portion of the Findings of the Commission, to-wit:

Aside from its irritating effect, the lamp affords no stimulation to the tissues of the skin,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Com-

mission and unlawful insofar as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist rfrom disseminating or causing to be disseminated any advertisement which represents

that said lamp affords any stimulation to the tissues of the skin in excess of such stimulation as may result from its irritating effect

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

9. The Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use may result in the production of Vitamin D

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

10. Paragraph numbered "3" of the Order of the Commission, insofar as it was based upon or depends upon the portions of the Findings and Order of the Commission hereinabove quoted, was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

Designation of Parts of the Record Necessary for
The Consideration of The Foregoing Points
Petitioner designates the following parts of the

certified transcript of the record filed by Respondent as necessary for the consideration of the foregoing points (since the pages of said transcript are not numbered consecutively, page numbers relating to the Complaint, Answer, Findings, Order and Exhibits 2 and 3 refer to numbers which, judging from the appearance of the photostatic negatives of said documents in the transcript, were placed on said documents with a numbering machine; page numbers relating to the short-hand reporter's "Official Report of Proceedings Before the Federal Trade Commission", included in said transcript, refer to what appear to be the reporter's page numbers):

1. Complaint (R. 1-9, incl.).
2. Answer to Complaint (R. 10-52, incl.).
3. Findings as to the Facts (R. 115-127, incl.).
4. Order to Cease and Desist (R. 128-131, incl.).
5. Portions of the reporter's transcript entitled "Official Report of Proceedings Before the Federal Trade Commission", as follows:

From		To	
Page	Line	Page	Line
2	1	2	12 Inclusive
3	1	3	end "
5	18	5	23 "
6	7	6	15 "
54	10	54	15 "
56	2	56	8 "
57	20	57	end "
61	18	63	17 "

From		To	
Page	Line	Page	Line
63	22	66	6 Inclusive
66	13	67	5 “
67	22	73	20 “
78	22	95	19 “
97	7	97	10 “
98	4	102	1 “
104	7	108	4 “
108	25	109	15 “
110	7	113	5 “
114	11	118	4 “
120	14	123	15 “
125	7	125	end “
128	16	130	4 “
141	2	141	2 “
145	2	145	24 “
149	23	149	23 “
151	9	151	11 “
165	13	170	11 “
170	21	175	end “
180	11	180	16 “
181	15	182	8 “
184	12	184	13 “
185	2	185	4 “
185	11	187	24 “
188	12	188	21 “
189	15	192	6 “
193	2	193	3 “
193	15	194	12 “
194	19	195	2 “
198	20	209	9 “

From		To	
Page	Line	Page	Line
211	22	224	21 Inclusive
227	1	228	2 “
228	21	237	11 “
238	17	242	19 “
244	8	281	end “
283	2	288	end “
349	12	354	4 “
355	2	355	3 “
355	11	369	11 “
373	5	373	12
374	10	375	15 “
379	17	382	8 “
382	23	385	7 “
388	9	394	6 “
394	16	398	2 “
399	14	399	24 “
401	20	401	24 “
402	12	403	7 “
403	24	410	14 “
410	23	414	7 “
415	8	456	18 “
457	15	457	end “
458	19	462	9 “
463	25	465	16 “
469	18	474	5 “
486	11	488	12 “
488	25	490	1 “
490	4	499	20 “
503	1	504	7 “
505	8	510	9 “

From		To	
Page	Line	Page	Line
510	22	515	15 Inclusive
519	9	519	10 “
519	22	520	1 “
521	4	521	8 “
521	16	527	11 “
528	18	531	3 “
540	22	542	6 “
545	1	545	4 “
546	4	546	23 “
550	2	550	17 “
554	23	554	24 “

6. “Respondent’s Exhibit 1 A-L” which, according to an unnumbered page appearing in said transcript between pages 106 and 107 thereof, is a book entitled “Report by Roger W. Truesdail, Ph.D.—The Cure of Rickets in Rats Exposed to the Radiations of the Life Lite Lamp” and filed separately from said transcript.

7. Respondent’s Exhibit 2 (R. 107)

8. Respondent’s Exhibit 3 (R. 108).

Dated this 19th day of June, 1943.

HENRY McCLERNAN

Attorney for Petitioner.

Copy mailed to Respondent June 19, 1943.

[Endorsed]: Filed June 23, 1943.

[Title of Circuit Court of Appeals and Cause.]

NOTICE

To:

Henry McClernan, Esq.,
2700 Hollister Terrace,
Glendale, California.

Dear Sir:

Please Take Notice that I am today forwarding to Paul P. O'Brien, Esq., Clerk of the United States Circuit Court of Appeals, at his office in the United States Court House, San Francisco, California, the respondent's designation of portions of the record in this cause (in addition to those previously designated by the petitioner herein) to be printed for consideration by this Court, (copy appended hereto).

JOSEPH J. SMITH, JR.

Assistant Chief Counsel
Federal Trade Commission

Washington, D. C.,
July 26, 1943.

Receipt of copy of the above notice and draft of respondent's designation of portions of the record to be printed, is hereby acknowledged this day of 1943.

.....
Attorney for the Petitioner

[Title of Circuit Court of Appeals and Cause.]

RESPONDENT'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Respondent, Federal Trade Commission, respectfully requests Paul P. O'Brien, Esq., Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to print as the record for review in this cause, in addition to the petitioner's designation of portions of the record to be printed, the following:

(1) Typewritten transcript of testimony:

From		To	
Page	Line	Page	Line
118	5	119	5 both incl.
126	1	128	15 "
134	21	137	6 "
149	24	151	8 "
170	12	170	20 "
178	17	180	10 "
182	9	183	1 "
187	25	188	11 "
192	16	193	1 "
193	4	193	14 "
301	16	303	19 "
304	4	306	15 "
456	24	457	14 "
458	1	458	18 "
483	16	486	9 "
499	21	502	13 "
502	21	502	25 "
504	8	505	6 "
546	24	547	2 "

(2) Exhibits:

Com. Ex. 1, 2, 10, 11, 13-B, 15, 16, 17, 21.

JOSEPH J. SMITH, JR.

Assistant Chief Counsel

Federal Trade Commission

Washington, D. C.,

July 26, 1943.

[Endorsed]: Filed July 30, 1943

No. 10218.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ULTRA-VIOLET PRODUCTS, INC., a corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF OF PETITIONER.

HENRY McCLENNAN,

2700 Hollister Terrace, Glendale, Calif.,

Attorney for Petitioner.

FILED

Parker & Baird Company, Law Printers, Los Angeles

6074 - 1943

PAUL P. O'BRIEN,

CLERK

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No. 10218.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ULTRA-VIOLET PRODUCTS, INC., a corporation,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF PETITIONER.

Jurisdiction.

On December 7, 1940, Respondent issued, and later served upon Petitioner, its Complaint charging Petitioner with having violated section 12 of the Federal Trade Commission Act, as amended (Title 15, section 52, U. S. C. 1940 ed.) and section 5 of that Act, as amended (Title 15, section 45, U. S. C. 1940 ed.) [R. 1]. Petitioner duly filed its written Answer to said Complaint, and after hearing and other proceedings Respondent made a report in writing in which it stated its findings as to the facts, and issued and caused to be served upon Petitioner, on June 13, 1942, an order requiring Petitioner to cease and desist from certain of the acts and practices alleged in the Complaint [R. 95]. The jurisdiction of this Court is invoked under section 5 of the Federal Trade Commission Act, as amended (ch. 311, sec. 5, 38 Stat. 719; Title 15, sec. 45, U. S. C. 1940 ed.).

Statement of the Case.

Petitioner is a California corporation, with its principal place of business in Los Angeles. It is in the business of manufacturing and selling ultra-violet ray lamps for therapeutic and other purposes.

The Complaint of Respondent Commission [R. 1], in addition to customary formal allegations, charged that Petitioner had disseminated false advertisements for the purpose of inducing purchases of its product known as "Life Lite." The Complaint set forth fourteen excerpts quoted from Petitioner's advertising matter, and termed them "false, misleading and deceptive" [R. 3]. It charged, further, that by the quoted and similar representations Petitioner had represented to the public that its "Life Lite" lamp had certain enumerated [Par. Four—R. 6, 7] qualities or virtues, and that its use would give certain benefits and effects [*id.*]. The Complaint denied, categorically or with qualifications, that the lamp had such qualities or virtues or that its use would give such benefits or effects [R. 7-9]. It also alleged [R. 9] that the advertisements were false because they failed to reveal that use of the "Life Lite" without trained supervision might result in injury to the user.

Petitioner's Answer [R. 12] admitted engagement in interstate commerce, and that the excerpts set out in the Complaint were quotations from its advertisements, but pointed out that they were separated from their original context, and denied that they were false, misleading or de-

ceptive. It denied other material allegations of the Complaint, and alleged affirmatively that the product, "Life Lite," would "give benefits to the skin and to the general health of the individual in the manner and within the therapeutic limits outlined" in Petitioner's advertising [Par. Five—R. 14]. It denied the alleged danger of injury in using the product without trained supervision [R. 15], and alleged that the user was protected by means of a timing device contained in the lamp, and by warnings and instructions. By way of separate answer, Petitioner alleged that the representations made in its advertising were made in good faith and were founded upon scientific knowledge [R. 16], referring specifically to technical and scientific literature, including copies of writings attached to the Answer as exhibits. The Answer concluded by offering to stipulate that Petitioner cease and desist "from any further dissemination of such statements, representations and claims as, in the light of present day scientific knowledge, may be contrary to fact" [R. 19].

After a hearing before a trial examiner, followed by written and oral argument, the Commission issued its Findings and Order, dated June 8, 1942 [R. 78-98], which were served upon Petitioner June 13, 1942 [R. 413]. The Petition for Review by this Court was filed August 11, 1942 [R. 415].

Petitioner now contends that portions of the Commission's Findings, quoted hereinafter under the subtitle "Specification of Errors," were not supported by the evidence before the Commission, and, therefore, that provi-

sions of the Order to cease and desist based upon those portions of the Findings should be set aside.¹ Since it will be necessary to examine the questioned parts of the Findings and Order, together with the evidence relating thereto, in subsequent sections of this brief, no statement of such parts is made at this point.

¹The issues presented to this Court are much narrower and less numerous than those which were before the Commission. For example, a substantial part of the testimony before the trial examiner related to the charge in the Complaint [Par. 6—R. 9] that use of the "Life Lite" without trained supervision might result in injury to the user. While Petitioner disagrees with the Commission's Findings in this respect, the Order to cease and desist [Par. 2—R. 97, 98] merely requires Petitioner to insert in its advertisements the words "Caution: Use Only As Directed," when the directions for use contain appropriate warning. Accordingly, Petitioner is content to comply with this part of the Order, and raises no issue concerning it in this Court. Similarly, for one reason or another, a number of other issues which were before the Commission are not presented here, although Petitioner's submission does not mean concurrence in the Commission's Findings. However, some of the evidence relating to these eliminated issues appears in the printed record, either because it could not be deleted without loss of coherence or because it was designated for printing by the Commission.

Specification of Errors.

1. The following portion of the Findings of the Commission, to-wit:

The benefits afforded by respondent's lamp to the skin and to the general health cannot properly be compared with those afforded by natural sunlight because of the wide variation between the rays emanating from the two sources,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents that Petitioner's therapeutic lamp known as "Life Lite"

affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

2. The following portion of the Findings of the Commission, to-wit:

While ultra-violet rays of the wave length emitted by [Petitioner's] lamp possess bactericidal properties, such properties are effective only in those cases where the infection sought to be attacked is limited to the surface of the skin. The rays are incapable of pene-

trating the surface of the skin and destroying bacteria or fungi present below the surface. The use of [Petitioner's] lamp therefore does not constitute a cure or remedy or a competent or adequate treatment for such conditions as . . . ringworm, athlete's foot, acne, eczema, psoriasis . . . , all of which are due to causes existing below the surface of the skin,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp constitutes a cure or remedy or a competent or adequate treatment for . . . ringworm, athlete's foot, acne, eczema (or) psoriasis . . .

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

3. The following portion of the Findings of the Commission, to-wit:

In the case of sores and ulcers, the lamp may possibly stimulate the healing process but only in those instances in which the infection causing the condition is confined to the surface of the skin,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion"

reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except in so far as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

4. The following portion of the Findings of the Commission, to-wit:

The lamp possesses no therapeutic value in the treatment of . . . bronchitis,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp possesses any therapeutic value in the treatment of . . . bronchitis . . .

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

5. The following portion of the Findings of the Commission, to-wit:

It is incapable of building up in the body resistance to disease,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp builds up in the body resistance to disease

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

6. The following portion of the Findings of the Commission, to-wit:

It does not produce any chemical reaction with respect to the blood stream, . . .

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the

said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp . . . produces any chemical reaction with respect to the blood stream . . .

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

7. The following portion of the Findings of the Commission, to-wit:

It is incapable of building up the body's resistance to infection,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp builds up the resistance of the body to infection . . .

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

8. The following portion of the Findings of the Commission, to-wit:

Aside from its irritating effect, the lamp affords no stimulation to the tissues of the skin,

was without substantial support in the evidence received by the Commission but was contrary to such evidence and was arbitrary, capricious and unlawful; the "Conclusion" reached by the Commission and contained in its Findings at the end thereof was beyond the jurisdiction of the Commission and unlawful in so far as it depended upon the said portion of the Findings; the Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp affords any stimulation to the tissues of the skin in excess of such stimulation as may result from its irritating effect

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

9. The Order of the Commission that Petitioner cease and desist from disseminating or causing to be disseminated any advertisement which represents

that said lamp normalizes the chemistry of the body, improves metabolism, or builds new tissues, except in so far as its use may result in the production of Vitamin D

was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

10. Paragraph numbered "3" of the Order of the Commission, in so far as it was based upon or depends upon the portions of the Findings and Order of the Commission hereinabove quoted, was not supported by the record before the Commission and was beyond the authority and jurisdiction of the Commission.

Summary of Argument.

(All of the issues concern the sufficiency of the evidence to support the Findings of the Commission.) Consideration of each of such issues must involve, of course, examination of all of the evidence bearing upon such issue. In the "Argument," immediately following, the analysis of the evidence is stated about as concisely, in the writer's opinion, as is feasible. Hence, it seems impracticable to attempt, here, more than a bare outline of the points which Petitioner undertakes to make and support in the following pages.

Petitioner does a business, in Los Angeles, in the manufacture and sale of ultra-violet ray lamps for various purposes, including therapeutic treatment. Only the therapeutic lamps are involved in this case. The business has been developed over a period of about ten years. Sales are made in interstate commerce. The product in question is a type of lamp known as "cold quartz," because its important element is a tube made of fused quartz which, in operation, does not develop such a high temperature as is developed by other types of quartz tube lamps. Rays emitted by cold quartz lamps are classified in the short-wave-length part of the electro-magnetic spectrum, most of them having wave-lengths shorter than those found in sunlight. Petitioner's lamp has been analyzed and tested extensively, and found to have the same output and effects as are standard for cold quartz type lamps. Ultra-violet ray lamps of various types are in common use.

At the hearing before the Commission's trial examiner, the Commission called as witnesses the President of Petitioner, two doctors, Ayres and Moor, and a Mrs. Dozier, who had been produced originally by Petitioner. In turn,

Petitioner called a consulting chemist and nutritionist, Dr. Truesdail, the head of the Department of Chemistry of Stanford University; Dr. Leighton, and a general practitioner of medicine and surgery, Dr. Parks. The Commission offered no rebuttal. Testimony given by the witnesses will be noticed in detail in subsequent parts of this brief.

The general question presented to this Court is whether the various portions of the Findings and Order of the Commission here challenged are adequately supported by the record, in view of the precedents establishing the scope of review in cases of this type (cited *infra*)

Petitioner contends:

1. That the Commission's Finding that benefits afforded by Petitioner's lamp to the skin and health are not comparable to those afforded by natural sunlight is not only questionable upon its face, but, whatever interpretation is given it, is entirely unsupported by the evidence;

2. That the Finding relating to the effect of treatment by the lamp upon ringworm, athlete's foot, acne, eczema and psoriasis was based upon a false assumption, namely, that the rays of the lamp do not penetrate below the surface of the skin, and is without substantial support in the evidence;

3. That the Finding relating to the effect of treatment by the lamp upon sores and ulcers was based upon the same false assumption, and is likewise unsupported;

4. That the same is true of the Finding relating to treatment of bronchitis by the lamp;

5. That the overwhelming weight of the evidence, including testimony by the Commission's witnesses themselves, was contrary to the Finding that the lamp was incapable of building up resistance to disease, said Finding apparently being based upon nothing but the Complaint;

6. That the same is true of the Finding that the lamp "does not produce any chemical reaction with respect to the blood stream";

7. That the ambiguous Finding concerning building up resistance to infection was not supported by any substantial evidence whatever;

8. That the Finding concerning stimulation to the tissues of the skin is logically unrelated to any of the evidence and wholly unsupported by the record;

9. That the provision of the Order relating to normalizing of body chemistry, improvement of metabolism, and building new tissues is not in accordance with the Findings, and should be corrected to conform thereto;

10. That paragraph 3 of the Order, which depends in part upon preceding provisions, should be set aside or modified to the extent to which such preceding provisions are set aside or modified;

Finally, that the Findings and Order, in the respects above mentioned, should be set aside (except in so far as Petitioner itself offers to conform to certain suggested modifications).

ARGUMENT.

I.

The Product in Question Was Developed, Tried and Proved Over a Period of More Than Ten Years.

HISTORY OF THE BUSINESS.

Petitioner, a California corporation, was incorporated December 18, 1933 [R. 102]. Thomas S. Warren, who was the first witness for the Commission before the trial examiner [R. 100], is General Manager of the company, and has been its President since its incorporation [R. 101].

Prior to that time Mr. Warren was employed by another company in Los Angeles, and while with it he commenced his study of ultra-violet rays in 1929 [R. 115, 391]. He read very extensively [R. 114, 397, 398], worked constantly in the physiotherapy department of the County Hospital for six months [R. 115], cooperated with laboratories and doctors in bactericidal tests [R. 114, 392], and took a night school course from the National School of Physiotherapy, at Los Angeles, graduating in 1931 [R. 115]. In November, 1932, he started in business for himself, under the name of Ultra-Violet Home Products Company, and in December, 1933, he incorporated Petitioner [R. 102, 393]. The therapeutic lamp known as "Life Lite" was first placed on the market in November, 1932 [R. 398], using the same quartz tube as had been used in the Metlox lamps, with which Warren had grown familiar [R. 391, 392].

Over the years, the company has developed a substantial business in the manufacture and sale of ultra-violet lamps for health purposes, and for use in sterilization and in

mining [R. 101]. The sterilization lamps are used in meat boxes, refrigerators, air conditioning rooms, air ducts, bakeries, and other places where their bactericidal effect is desirable. The mining lamps are used for analysis of ores, in laboratories for chemical analysis, and by police departments [R. 101, 102]. The health lamps, known as "Life Lite," were the only ones under attack in this proceeding by the Commission. These lamps, in various models, range in price from \$49.50 to \$130 [R. 400], and from 1932 to the time of the hearing, in May, 1941, the company had sold approximately 3400 of them [R. 102]. Most of the lamps are rented to prospective purchasers before they are sold [R. 399].

THE PRODUCT.

Various types of lamps are used to create ultra-violet rays [R. 113, 114, 162, 316, 317], but those most frequently mentioned in this case are the "hot quartz" and the "cold quartz" types. In each of these, the important element is a tube made of fused quartz. Quartz is used because it transmits the radiation much better than does glass [R. 165]. The hot quartz lamp has a tube with a considerable amount of mercury in it, vaporized in operation by a low voltage, high amperage electrical arc, and giving off ultra-violet rays of high intensity and various wave-lengths [R. 113, 114]. In the cold quartz lamp, the tube is exhausted of all gases, and then filled with a mixture of helium, argon, neon and krypton, with only a small amount of mercury added, and hermetically sealed. In operation, the mercury vapor is ionized by a high voltage, low amperage electrical current, and produces a high intensity of ultra-violet light, most of which is concentrated in the neighborhood of a single wave-length, 2537 ang-

strom units.² All cold quartz lamps are approximately the same in so far as concerns the spectral range of the ultra-violet rays emitted by them, but they vary in potency [R. 163, 209, 318, 319]. Petitioner's lamp, "Life Lite," is of the cold quartz type; it is more properly called a "mercury vapor discharge tube" than a "mercury arc" [R. 162, 163]. Another type of lamp discussed by the witnesses is the so-called sun lamp. It is designed to reproduce, to some extent, at least, the range of ultra-violet radiation that is found in sunlight. The ideal sun lamp would be one which emitted ultra-violet radiation not differing essentially from clearest weather, mid-day, mid-summer, mid-latitude, sea level natural sunlight, but many of the sun lamps on the market depart appreciably from that standard [R. 325, 326].

SCIENTIFIC BACKGROUND.

The electro-magnetic spectrum contains a very broad range of wave-lengths of rays [R. 321]. For present purposes, it is sufficient to notice only some parts of it. Wave-lengths in the infra-red portion run from about 7800 angstrom units to perhaps as long as 150,000; in the visible portion (violet, indigo, blue, green, yellow, orange and red) from about 3900 to approximately 7800; in the ultra-violet from less than 1860 to about 3900. The shortest ultra-violet ray which quartz will transmit is 1860 angstrom units. The longest infra-red rays found in natural sunlight are about 50,000 angstrom units [R. 162].

The range of ultra-violet wave-lengths found in natural sunlight overlaps the range produced by cold quartz lamps,

²The units of measurement commonly used in measuring or classifying wave-lengths of rays in the electro-magnetic spectrum are the millimicron and the angstrom unit. One millimicron equals ten angstrom units [R. 157], and one angstrom unit equals one ten-millionth ($1/10,000,000$) of a millimeter [R. 321].

but the two do not coincide. Most of the rays from cold quartz lamps are shorter than those in sunlight [R. 163]. The sun's ultra-violet spectral range is from about 2910 angstrom units to about 3900 [R. 158]. That of the "Life Lite" lamp, which is the same as that of any standard cold quartz unit, runs from about 2540 (2537)³ to 3660, but 89.2 per cent of the lamp's energy output is concentrated in the region of 2540 angstrom units [R. 119, 120].

Not all ultra-violet rays have biological or actinic (chemical) effects upon the human body. The range from 3900 or 4000 angstrom units to about 3200 is apparently negative [R. 124]. The actinic rays from the sun are in the range from 2900 to 3200 angstrom units [R. 124, 125].

SUCCESS EXPERIENCE.

During Mr. Warren's employment by the Metlox Corporation, in 1929, he took the lamp then being made by that company to the California Institute of Technology, and had it analyzed [R. 391, 392]. He also took it to laboratories in Los Angeles, where bactericidal tests were made with it, and had six or eight doctors using the lamp in their practice, in order to get first-hand information [R. 392]. The identical quartz tube used in the Metlox lamp was later used in the "Life Lite" lamp under attack in this proceeding by the Commission [R. 392]. When Warren started in business as the Ultra-Violet Home Products Company, in 1932, he started to manufacture a lamp with a tube of a slightly different shape, and using a slightly different current, so he took the Model A hand

³Witnesses used 2540 angstrom units as synonymous with 2537, the difference being negligible as a practical matter [R. 245, 268, 325].

lamp to Dr. Wesley Leighton,⁴ a professor and research worker in ultra-violet radiation at Pomona College [R. 393, 394]. There he and Dr. Leighton, working together, measured the ultra-violet output of the lamp, and it checked exactly with the standard output of the cold quartz type lamp [R. 394].

Not content with investigation by others, Warren started, in 1930, to use the lamp consistently in daily treatments upon himself [R. 102, 103]. He observed a beneficial effect upon his general health [R. 103, 105], and used it with repeated success to clear up an athlete's foot condition on his feet [R. 105, 106].

Later, in 1935, Dr. Roger W. Truesdail, whose testimony before the trial examiner in this proceeding will be discussed in more detail later in this brief, performed elaborate experiments, using standard and accepted methods, in his laboratories in Los Angeles, to determine whether the "Life Lite" lamp would cure, or cause recalcification in, rats that had been made rachitic [R. 213-261]. He found that there was a definite healing of rickets in all animals exposed to the lamp [R. 220, 241]. He testified, without contradiction, that the use of ultra-violet light irradiation as an aid in the prevention of rickets in children is a common practice [R. 255].

Ultra-violet lamps are also commonly used in health resorts and physical training offices [R. 369]. It has long been common knowledge that there is a correlation between vitamin D in human beings and ultra-violet rays. *General Baking Co. v. Grocers Baking Co.*, 3 F. Supp. 146, 148 (D. C. W. D. Ky., 1933); *Wisconsin Alumni R. F. v. Vitamin Technologists*, 41 F. Supp. 857 (D. C. S. D. Cal., 1941).

⁴Brother of the Dr. Leighton who testified before the trial examiner.

II.

The Evidence Adduced by the Commission in Support of Its Complaint Was Inconclusive in Character.

Detailed examination of the evidence will come in later sections of this brief, but it may be helpful, at this point, to consider, as a whole, the proceedings before the trial examiner.

The first witness called by the Commission was Thomas S. Warren, President and General Manager of Petitioner [R. 100]. His testimony was devoted largely to matters not here in issue, but he did relate his own personal experience in using the "Life Lite" lamp, including the definite benefits he derived therefrom [R. 102-107]. His testimony in that regard was never contradicted or seriously questioned by other witnesses.

Dr. Samuel Ayres, Jr., was next called. He testified that after graduating from medical school in 1919 with a degree of M. D., followed by internship and some graduate assistant work [R. 129], his practice had been limited to diseases of the skin [R. 129, 132]. By another witness, he was described as one of the most prominent skin men in the city, and well known throughout the country [R. 208]. Petitioner does not question his qualifications as a dermatologist, but his understanding of the "Life Lite" lamp and the therapeutic benefits to be derived from its use is another question. He had used ultra-violet light in his practice for about twenty years, and a lamp of the cold quartz type for approximately eight or ten years [R. 129, 146], but he had not even examined the "Life Lite" lamp [R. 145, 146], and his concept of the spectral range of sunlight as compared to that of the lamp was hazy [R. 149]. He evaded a request for au-

thority in support of his statement that natural sunlight contains rays of the length that emanate from cold quartz lamps, saying that the question was one for a physicist [R. 149], and admitted that that was something about which he was merely speculating, as far as his testimony was concerned [R. 149]. It was his opinion that all disease is properly a subject for treatment or supervision by a physician rather than home treatment [R. 145].

Dr. Fred B. Moor, the third witness for the Commission, was also unacquainted with the "Life Lite" lamp [R. 161]. His specialty had been in the fields of pharmacology, therapeutics and physical therapy [R. 156]. He had used the hot quartz lamp in treating many patients [R. 207], but the clinic with which he was connected used the cold quartz lamp only occasionally [R. 177]. He admitted that he had had very little experience in the use of the cold quartz in general therapy, and that his personal experience was not sufficient to form a basis for an opinion as an expert witness [R. 193]. His testimony was based, in part, upon published statements of the Council of Physical Therapy of the American Medical Association [R. 180], and when he said that treatment by the cold quartz lamp for certain ailments or purposes was "not generally accepted", he meant not accepted by the Council of Physical Therapy [R. 177]. He conceded that, generally speaking, a statement issued by the Council of Physical Therapy in its publication will be based only upon an experience which, to the mind of the majority of the Council, "conclusively establishes that the particular device or product does accomplish a particular result beyond all question" [R. 179]. In order to obtain a statement by the Council favorable to a particular device or treatment, it is necessary that the device or treatment be brought to the

Council's attention and have an established experience of success; hence, many devices have been used successfully for a considerable period of time prior to their being favorably reported upon in a statement of the Council [R. 179, 180].⁵ None of the things that Dr. Moor said were unproved had been disproved, to his knowledge. There is great division of opinion among physicians and research men of high standing in the field of ultra-violet therapy and the use of therapeutic lamps of 2540 or 2537 angstrom units wave-length [R. 205]. According to Dr. Moor, it is the general philosophy of the medical profession that people should not undertake any health measure, other than the ordinary activities of eating and sleeping, except on the advice of a physician [R. 175, 176]. "Physicians are interested in protection of the public, and most of these things, outside of eating and sleeping, are something which may have some potential danger in them" [R. 176].

No other witnesses were produced by the Commission.

The inconclusive and inadequate character of the evidence adduced by the Commission in support of its Complaint is given additional emphasis by consideration of that presented by Petitioner.

Dr. Roger W. Truesdail, the first witness called for Petitioner, was a consulting chemist and consulting nutritionist. In addition to scholastic training at the University of Redlands, the University of Oregon and the University of Washington, and a wide teaching experience in the field of chemistry, he had practiced his profession in Los Angeles since 1931, and was President and a director of labora-

⁵There is no evidence in the record that Petitioner's product, or any cold quartz lamp, has ever come to the attention of the Council of Physical Therapy.

tories working primarily in chemistry and bacteriology [R. 209-211]. During the twelve years prior to the hearing he engaged in study of and experimentation with vitamin D, to determine its presence in animals, sources of it, and processes involving the creation of it [R. 211, 212]. Rats are the animals commonly used in laboratories for vitamin D tests or assays, and Dr. Truesdail had had under his supervision or direct control ten thousand or more of them, used solely for vitamin D work [R. 216]. During the year 1935, he conducted experiments with Petitioner's product, "Life Lite" [R. 213], to determine whether its light would cure, or cause recalcification in, rats that had been made rachitic [R. 215, 216]. His testimony described in detail the technique that was used in the experiments [R. 216-219, 241-243, 257] and the results obtained⁶ [R. 219-241]. The clarity and coherence of his discussion are convincing in themselves, and help to explain why no attempt was made by the Commission to contradict or otherwise impugn his testimony. Dr. Truesdail has himself owned a "Life Lite" lamp, and used it in his own home [R. 213].

Dr. Philip A. Leighton was next called for Petitioner. At the time of the hearing, he was Professor of Chemistry and executive head of the Department of Chemistry at Stanford University. After taking a Bachelor's degree and a Master's degree at Pomona College, California, he took a Master's degree and the degree of Doctor of Philosophy at

⁶There was a definite healing of rickets in all animals exposed to the lamp [R. 220, 241].

Harvard University. He had also studied at the University of Munich, at Johns Hopkins University, at Cambridge University in England, and at the Imperial College of Science in London, and taught at Harvard and, since 1928, at Stanford [R. 266, 267, 313]. His writings in the field of ultra-violet radiation, from 1926 to 1935, had been published in the Journal of the Optical Society of America, the Physical Review, the Journal of Physical Chemistry, the Journal of the American Chemical Society, and the Review of Scientific Instruments [R. 267]. At the time of the hearing there was about to be published under the auspices of the American Chemical Society a book entitled "The Photochemistry of Gases", of which Dr. Leighton was co-author [R. 296].

Ultra-violet light is a subject of continuous research in Dr. Leighton's department at Stanford, and the information he gave at the hearing was the latest available on the subject. He had engaged in that study within a week before he took the witness stand [R. 296]. He was a physical chemist, and his special field of interest had been photochemistry [R. 268], which is the study of the chemical effects of light, including the invisible rays, such as ultra-violet [R. 268]. He had been engaged in the field of photochemistry for eighteen years (*id.*), and the chemical effects of light in the skin had been part of his interest [R. 338]. He had used hot quartz lamps in his experiments, and designed several of his own [R. 346], and also had used Petitioner's product, the "Life Lite", in his studies [R. 284].

Dr. Leighton identified two charts or graphs reflecting information considered basic in the science of photochemistry⁷ [R. 297], and accepted as facts, rather than opinions, by photochemists in general [R. 298]. Those facts are as fundamental in the study of photochemistry as is the law of gravity in the study of physics (*id.*) The Commission's trial examiner first admitted the charts in evidence [R. 270, 286], and then, upon motion of the Commission's attorney, struck them out [R. 303]. The stated purpose of this procedure [R. 273] was to enable the Commission finally to rule, but the record does not reveal what, if any, ruling was made by the Commission.

The final witness for Petitioner (except that during deferred cross-examination of Thomas S. Warren, he became *pro forma* a witness for Petitioner for a short time) was Dr. Floyd Roswell Parks. He was a physician and surgeon, in general practice of medicine and surgery in California since 1929 [R. 358]. He was a graduate of Harvard University in 1925 with the degree of Doctor of Medicine, was a member of the Los Angeles County, the State, and the American Medical Associations, the Los Angeles Surgical Society, a fellow of the American College of Surgeons, and had been associated with the General Hospital, Children's Hospital, St. Vincent's Hos-

⁷The first chart, representing absorption curves of layers of the skin and the absorption curve of ergosterol, as functions of wave lengths of ultra-violet rays, was marked "Respondent's Exhibit 2" [R. 269]. Petitioner here was, of course, designated "Respondent" in the hearing before the trial examiner. The second chart, showing relative efficiencies of different wave lengths of ultra-violet light in the production of erythema, vesiculation of paramercia, and bactericidal action, was marked "Respondent's Exhibit 3" [R. 275].

pital, Queen of Angels Hospital, and Hollywood Hospital [R. 358, 359]. He specialized in general surgery, and was not primarily a physiotherapist [R. 372, 374]. However, he had used ultra-violet light in his practice since 1933 [R. 359, 369, 370], at which time the cold quartz type of lamp was just coming on the market [R. 389]. He was familiar with the type of light, of 2537 angstrom units wave-length, emanating from cold quartz lamps, and had observed the results of that light upon the human body [R. 359]. He had not personally applied the lamp in treatment of patients [R. 375], preferring to send them to physiotherapy departments of hospitals [R. 371-373, 382, 384, 388], but had studied its use in the treatment of disease, and its effect upon human health [R. 359]. He was familiar with the "Life Lite" lamp, manufactured by Petitioner [R. 359, 360], had found it to be very beneficial, and recommended it to his patients [R. 360, 388]. He described in some detail an actual case in which he advised the use of one of Petitioner's lamps on a patient, and conspicuously good results followed the treatment [R. 361, 367, 368].

At the conclusion of Petitioner's evidence the Commission produced no rebuttal, and the case was closed for the taking of testimony.

III.

The Portions of the Commission's Findings and Order Here in Issue Were Without Substantial Support in the Evidence.

SCOPE OF REVIEW.

Section 5 of the Federal Trade Commission Act, as amended (Title 15, U. S. C. 1040 ed., Sec. 45), provides: "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

It is well settled that the word "evidence", as used in the statute, means *substantial* evidence. Construing the same provision—identical in wording except that "Board" is substituted for "Commission"—in the National Labor Relations Act (Title 29, Sec. 160 (e), U. S. C. 1940 ed.), the Supreme Court, in *National Labor Relations Board v. Columbian Enameling and Stamping Co.*, 306 U. S. 292 (1939), said (pp. 299, 300):

Section 10 (e) of the Act provides: ". . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive." But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197; *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board v. Thompson Products Inc.*, 97 F. 2d 13; *Ballston-Stillwater Knitting Co. v. National Labor Relations Board*, 98 F. 2d 758, 764. Substantial evidence is more than a

scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. National Labor Relations Board*, *supra*, p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524; *Gunning v. Cooley*, 281 U. S. 90, 94; *Appalachian Electric Power Co. v. National Labor Relations Board*, *supra*, 989.

To the same effect, see *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1938), and *Neff v. Federal Trade Commission*, 117 F. (2d) 495 (C. C. A. 3, 1941). In the case of *Gunning v. Cooley*, 281 U. S. 90 (1930), cited *supra* in the *Columbian Enameling and Stamping Co.* case, the Court discussed the *quantum* of evidence sufficient to send a case to a jury, and said, in part (p. 94) :

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Improvement Company v. Munson*, 14 Wall. 442, 448. *Pleasants v. Fant*, 22 Wall. 116, 122.

* * * * *

Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no

room to doubt what the fact is, the court should give a peremptory instruction to the jury. *People's Savings Bank v. Bates*, 120 U. S. 556, 562. *Southern Pacific Company v. Pool*, 160 U. S. 438, 440.

In order to determine in any particular case whether or not the evidence supporting the findings is substantial, it is necessary, of course, to examine the record as a whole. Such is the practice of the courts, well exemplified in *International Shoe Company v. Federal Trade Commission*, 280 U. S. 291 (1930). There, the Court had before it a proceeding under section 7 of the Clayton Act, and the case turned upon the question of the existence of substantial competition between International Shoe Company and the corporation whose stock it had acquired. In part, the Court said (pp. 297, 299):

The rule to be followed is stated in *Federal Trade Comm'n v. Curtis Co.*, 260 U. S. 568, 580:

“Manifestly, the court must inquire whether the Commission’s findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without

further delay the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act.”

* * * * *

In addition to the circumstances already cited, the officers of the International testified categorically that there was in fact no substantial competition between the companies in respect of these shoes, but that at most competition was incidental and so imperceptible that it could not be located. The existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the business which they have carried on, assert that there was no real competition in respect of the particular product, their testimony is to be weighed like that in respect of other matters of fact. And since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted.

Also illustrative are *Neff v. Federal Trade Commission*, 117 F. (2d) 495 (C. C. A. 3, 1941), and *Kidder Oil Co. v. Federal Trade Commission*, 117 F. (2d) 892 (C. C. A. 7, 1941). The proceedings leading up to the Commission's order in the *Kidder Oil Co.* case were similar in many respects to those in this case. The Commission relied largely upon an exhibit—an old report of tests made by the United States Bureau of Standards—and testimony of two expert witnesses. The oil company produced experts who had made actual experiments. The Court said, in part (p. 899):

A study of the record is convincing that the overwhelming weight of the testimony is contrary to the

Commission's contention, and under such circumstances, it occurs to us that the Commission would have discerned the importance, and perhaps the necessity, of making such tests and experiments as would demonstrate, at least to a reasonable certainty, the validity of the charge which it had the burden of sustaining. * * * Thus, all through this letter, as in Exhibit 19, and the testimony of Brooks and Dill, the information (if it may be called such) is what graphite may or might do, rather than what it does or does not do. Information of such a speculative and uncertain nature can afford little, if any, support to findings based thereon. * * * We recognize that our province is not to weigh the testimony, but we think it is not inappropriate to briefly refer to some of the direct positive testimony which contradicts many of the uncertain statements made by the witnesses relied upon by the Commission, and the inferences indulged in by such witnesses.

Accordingly, with respect to each part of the findings and order of the Commission here in issue, all of the evidence bearing upon such part should be examined, with a view to ascertaining whether such part finds therein substantial support in the legal sense.

1. *Benefits Comparable to Those of Sunlight.*

The Complaint alleged [Par. Five; R. 7, 8] that Petitioner's lamp "will not give benefits to the skin and to the general health of the individual comparable to that given by natural sunlight for the reason that the ultraviolet rays emitted therefrom are not, in turn, comparable to the ultraviolet rays emitted by natural sunlight." The Commission found [Findings, Par. Six; R. 91] that the

“benefits afforded by [Petitioner’s] lamp to the skin and to the general health cannot properly be compared with those afforded by natural sunlight because of the wide variation between the rays emanating from the two sources.” The next sentence went on to recite that rays emitted from natural sunlight range from 2900 angstroms in the ultra-violet rays to approximately 50,000 angstroms in the infra-red rays. Upon the basis of this Finding, Petitioner was ordered to desist from disseminating advertisements representing that its product “affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight” [Order, Par. 1 (a); R. 96].

Close consideration of the key words “comparable” and “compared”, in the passages just quoted, reveals an ambiguity of potential importance. Webster’s New International Dictionary, Second Edition, Unabridged (1941), defines “comparable” as follows: “*Capable* of being compared (with); *worthy* of comparison (to).” To like effect, Funk & Wagnalls New Standard Dictionary of the English Language (1939): “That *may* be compared; *fit* to be compared.” The New Century Dictionary (1930): “*Capable* of being compared; *worthy* of comparison.” (Italics supplied.) In using the word “comparable” in its Complaint and Order, what did the Commission mean? Did it mean (a) capability or possibility of comparison, or (b) worthiness of or fitness for comparison? So with the word “compared”: its present tense form, “compare”, may mean “To examine character or qualities of, as of two or more persons or things, for the purpose of discovering their resemblances or differences” (Webster, *supra*); “To examine (two or more persons or things) with reference to points of likeness or unlikeness: place

together, literally or mentally, so as to perceive similarity or dissimilarity, as of property or relations" (Funk & Wagnall, *supra*); "bring together, one with another, for the purpose of noting the points of likeness and difference" (Century, *supra*); or it may mean "To represent as similar as for the purpose of illustration; to liken; . . . followed by *to*; as, to *compare* men to rats" (Webster, *supra*); "To represent or speak of as similar, analogous or equal; liken: with *to*; as, to *compare* wisdom *to* gold" (Funk & Wagnall, *supra*); "To represent as similar or analogous (*to*); liken" (Century, *supra*). In using "compared" in the finding above quoted, did the Commission mean that benefits afforded by Petitioner's lamp and benefits afforded by sunlight could not be examined or brought together mentally so as to perceive similarities or dissimilarities, or did it mean that such benefits from the two respective sources could not be spoken of as similar, or likened?

As used in the passage quoted from the Complaint, the fact that "comparable" is followed by "to", in each of the two places where it is used, would seem to point toward the concept of worthiness of or fitness for comparison. Yet to talk of ultra-violet *rays* from one source as being "unfit" to be compared, or "unworthy" of comparison, with ultra-violet rays from another source would undoubtedly be so absurd as to arouse the mirth of the men of science who testified at the hearing. In the Complaint, therefore, "comparable" must mean capable of being subjected to the mental process of perception of resemblances and differences. The same reasoning applies to "compared", as used in the Findings; the only reasonable interpretation of the juxtaposition of the sentence relating to benefits and the sentence relating to wave-lengths of light rays is that the former states a conclusion drawn

from the latter (in conjunction with the preceding subparagraph of the Findings), and it seems clear that comparing light rays with each other in terms of their wave-lengths in angstrom units is not the same process as likening men to rats or wisdom to gold. It follows, of course, that “comparable” was used in the Order in the same sense; otherwise that part of the Order did not follow the Complaint and Findings, and hence was improvident, and should be annulled. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, 40 S. Ct. 572, 574, 64 L. Ed. 993 (1920); *Wrisley Co. v. Federal Trade Commission*, 113 F. (2d) 437, 442 (C. C. A. 7, 1940).

But if the foregoing reasoning is sound, *i. e.*, if “comparable” and “compared” are used by the Commission as relating to measurability of mutual characteristics or qualities by common standards rather than as relating to worthiness or fitness, the very definition demonstrates the invalidity of the finding in question, for, from the beginning of the proceeding to the end, the parties, the attorneys and the witnesses did little else (as far as this particular issue is concerned) but “compare” the wave-lengths of the ultra-violet rays of the lamp with the wave-lengths of the ultra-violet rays of the sun, in terms of spectral ranges measured in angstrom units [Complaint, Par. Five, R. 7; Findings, Par. Six, R. 90; and see references under “Scientific Background”, *supra*], and “compare” the effects of the lamp’s rays with the effects of the sun’s rays, in terms of production of erythema⁸ [R. 108, 283, 309, 327, 379], bactericidal action [R. 163, 188, 189, 282, 289, 290, 292, 295, 310, 336, 356, 357], production of vitamin D, and the beneficial results of that production [R. 254, 281-283, 292,

⁸Erythema is the medical term for sun burn [R. 108].

303, 304, 329, 330, 349, 350, 355, 356], vesiculation⁹ [R. 280, 283], and tanning [R. 132, 133, 282].

On the other hand, if it be assumed for the sake of argument that the Commission used “comparable” and “compared” in the sense of worthiness or fitness, an obvious *non sequitur* appears on the face of the Complaint and Findings. From the fact that the spectral range of ultra-violet light emitted from the “Life Lite” lamp differs in part from the spectral range of ultra-violet rays found in sunlight, it does not follow that there is any difference in beneficial effects of the rays as between the two sources. The mere statement of the contrary contention shows the fallacy. It is clear that, in fact, differences between effects of the principal biologically active band in the “Life Lite” spectrum and effects of the biologically active ultra-violet bands in sunlight are relative, and not specific [R. 289, 290, 295, 311, 312, 313, 328, 336, 353, 354].

However, it is not necessary to rely upon logomachy. Even if the Commission used the words in question indiscriminately, and regardless of the possible variant meanings, Petitioner submits that the Finding still lacks substantial support in the record. In response to a leading question, Dr. Ayres advanced the bald opinion that he did not think that a lamp such as Petitioner’s would give benefits to the skin comparable to those given by general sunlight [R. 132]. When asked about benefits to general health, as distinguished from skin, he replied [R. 133]: “From direct personal observation, I am not able to answer the question, but from general impression and from literature, I would say that it probably has not the same

⁹Vesiculation is the biological phenomenon which results in, and is usually observable as, blistering [R. 283].

effect that you would get from the sunlight, in particular, that you lack the tanning procedure, and that is considered to be intimately connected with certain of the benefits of the natural sun." The question had been whether the lamp would give a benefit *comparable* to that given by natural sunlight [R. 132]. At other points, when asked if the lamp would make an improvement in the metabolism, he replied that he did not believe one could expect to get the "same" effect from this type of radiation as from natural sunlight [R. 141, 142], and, concerning activation of vitamin D in the human body, he said he did not think the amount produced by cold quartz light would be "so much" as is produced by natural sunlight [R. 150]. Aside from its evasiveness, testimony of this character would hardly seem to be satisfactory as a foundation for an order which might have drastic economic consequences to Petitioner. Testimony of the other expert witness for the Commission, Dr. Moor, did not use the words "comparable" or "compared". When asked to state the difference in effect as between the shorter rays from cold quartz lamps and rays of natural sunlight, he replied [R. 163]: "Well, the shorter rays are much more irritating to the skin. They are bactericidal, more bactericidal than sunlight. They do not have the same biological effects as sunlight." What he meant by "same" is not clear, since, a short time later, he referred to the maintaining of phosphorus and calcium of the body and inhibition of rickets as proven benefits from devices such as Petitioner's product [R. 173]. Such benefits are, of course, derivable from sunlight [R. 254, 292, 329, 349, 350]. As to the bactericidal action, there was read to him this statement, concerning the ultra-violet ray of 2537 angstrom units wave-length: "In regard to the bactericidal effect

it does not differ from rays of longer or shorter wave length," and he said the statement was correct [R. 188, 189].

The lack of substance in the remarks of the Commission's experts appears more sharply by comparison with the clear and convincing testimony of Drs. Truesdail and Leighton.

After describing in detail his experiments with Petitioner's lamp upon rachitic rats, and the definite healing of rickets in the animals [R. 220-243], Dr. Truesdail testified upon cross-examination as follows [R. 254]:

"Q. In your opinion, would the use of respondent's device have the same effect in preventing rickets and related diseases as natural sunlight would have, or would there be any difference? A. Well, I would say that for the actual calcium and phosphorus metabolism, the light, the artificial light, is more effective than the natural sunlight, because it possesses a biological band in larger relative quantities even than sunlight.

Q. You mean the shorter rays would be more effective? A. Yes, that is true. You can put food out in the sunlight and put milk out there, and you don't get a creation of very much vitamin D, but you can take an artificial source and produce vitamin D in it."

To the same effect: *Wisconsin Alumni R. F. v. Vitamin Technologists*, 41 F. Supp. 857, 865 (D. C. S. D. Cal., 1941).

Equally direct and to the point was the testimony of Dr. Leighton. First explaining his basic charts,¹⁰ and pointing out that the shortest wave length of ultra-violet light found in the solar spectrum is usually between 2900 and 3000 angstrom units [R. 279], he proceeded to compare the effects of ultra-violet rays of 2537 angstrom units, such as are emitted from the "Life Lite" lamp, with effects of ultra-violet rays found in the light of the sun (or of sun lamps). Both sun lamps and lamps emitting

¹⁰Exhibit 2, the chart showing absorption of ultra-violet rays by layers of the skin and by ergosterol [R. 269], contained four curves, or graphs. The one marked "ergosterol" shows that absorption by the substance, ergosterol (the substance which, when exposed to ultra-violet irradiation, produces vitamin D—R. 346, 347) is approximately the same at 2537 angstrom units as at 3000 angstrom units [R. 303, 304]. The one marked "corneum" (the outer or horny layer of the skin—R. 304) shows that absorption by that layer of the skin is "slightly greater at 2537, but not markedly greater" than at 3000 angstrom units [R. 304]. The one marked "granulosum" (the skin layer underlying the corneum—R. 305) shows that absorption by that layer, also, is "slightly greater at 2537, but not markedly different" from absorption by it at 3000 angstrom units [R. 305]. The line marked "germinativum" (underlying the granulosum—R. 305) shows that absorption here, also, is "slightly greater at 2537" than at 3000 [R. 306]. The curve for "corium," the fourth layer (underlying the germinativum, R. 306, and the one in which ergosterol is chiefly found [R. 307, 347], and the vitamin D activity is produced R. 306) also shows that absorption by that layer is "slightly greater" at 2537 angstrom units than at 3000 [R. 306, 307].

Exhibit 3, the chart showing relative efficiencies of different wave lengths of ultra-violet light in the production of erythema, vesiculation of paramercia, and bactericidal action [R. 275], contained three curves. The one for erythema (synonymous with sunburn; it is questionable whether erythema in itself is beneficial, but to produce the known beneficial effects, which are not visible to the eye, erythema, which is visible, must also be produced—R. 327) shows that the 2537 angstrom unit wave length is a little more efficient than 3020 [R. 282] and much more efficient than 3100 [R. 309]. The vesiculation curve (vesiculation was accepted as a criterion of the death of a single cell or single-celled organ, R. 277; in human skin it is observable as blistering, R. 283) shows that the vesiculation power of the 3000 angstrom unit wave length is "somewhat higher than at 2537, but not markedly different" [R. 310]. The line for bactericidal action shows that efficiency at 2537 is "considerably higher" than at 3000 [R. 310].

In order to determine the net effect of any wave length upon any particular cells in the human skin, it is necessary to consider the information shown by both charts, because such net effect will depend upon (a) the amount of light which reaches those cells, and (b) the efficiency of the wave length [R. 280, 313, 343].

The two charts are reproduced at pages 271 and 287 of the printed Transcript of the Record.

rays of 2537 angstrom units wave length will produce erythema, both will produce increased vitamin D activity, and both have a bactericidal and vesiculation action [R. 281]. In a practical way, the chief effect that one would obtain from the ordinary sun lamp would be a coat of tan, and the chief effects that one would obtain from rays of 2537 angstrom units would be an increased vitamin D activity, erythema and bactericidal action [R. 282]. The only definitely established beneficial effects of natural sunlight and sun lamps are increased vitamin D activity and bactericidal action [R. 330], and that is also true of cold quartz type therapeutic lamps [R. 356].¹¹ Specific effects produced upon the human being by 2537 angstroms are also produced by sunlight, and those produced by the ultra-violet in sunlight are also produced by 2537 angstroms [R. 295, 311, 336, 353], except as to tanning, which is of doubtful benefit [R. 335, 336]. There are relative differences, but no specific differences [R. 289, 295]. The cold quartz lamp is more efficient in its bactericidal effect [R. 336, 357]. To obtain the same results by the use of the cold quartz lamp, it would not be necessary to expose the skin as long with the natural sunlight or the average commercial sun lamp [R. 355]. In cases of human beings irradiated by wave-lengths of 2540 angstrom units and of 3000 or thereabout, results will be determined by, first, the relative intensities of the sources used; second, the relative absorption by skin layers for the different wave lengths; and, third, the relative absorption by such substances as ergosterol [R. 313]. As these things are true of cold quartz type lamps, in general, so

¹¹The more particular effects discussed in succeeding sections of this brief fall into one or the other of these two general categories of beneficial effects.

also are they true of Petitioner's product, in particular. Comparing results from a short exposure with a "Life Lite", sufficient to produce erythema, with results from exposure to the sun for a long enough period of time to produce the same erythema, the amount of vitamin D activation would be about the same for each source, and Petitioner's product would have a greater bactericidal action [R. 292, 336, 349, 350]. Exposure to a cold quartz lamp, used according to directions for the use of the "Life Lite" hand model, would give a greater beneficial effect than would exposure to sunlight for the same length of time [R. 329].

Considering the evidence upon this issue, as a whole, Petitioner submits that it overwhelmingly compels the conclusion that the parts of the Commissioner's Finding and Order last above quoted are entirely unsupported by the record, and should be set aside.

2. *Ringworm, Athlete's Foot, Acne, Eczema, Psoriasis.*

The Complaint alleged that Petitioner had represented that the use of its lamp "provides a cure, remedy or competent and adequate treatment for . . . ringworm . . . athlete's foot, acne, eczema, psoriasis, . . . and that it will give relief in all of such conditions, diseases and ailments" [Par. Four, R. 6]; it alleged, further, that the therapeutic value of Petitioner's lamp "is limited to the possible destruction of bacteria when present on the surface of the skin and it would be of no value in the treatment of . . . ringworm . . . athlete's foot, acne, eczema, psoriasis . . ." [Par. Five, R. 8]. The Commission found as follows [Par. Seven, R. 91]:

While ultra-violet rays of the wave length emitted by [Petitioner's] lamp possess bactericidal properties,

such properties are effective only in those cases where the infection sought to be attacked is limited to the surface of the skin. The rays are incapable of penetrating the surface of the skin and destroying bacteria or fungi present below the surface. The use of [Petitioner's] lamp therefore does not constitute a cure or remedy or a competent or adequate treatment for such conditions as . . . ringworm, athlete's foot, acne, eczema, psoriasis . . ., all of which are due to causes existing below the surface of the skin.

and thereupon ordered Petitioner to cease and desist from representing "that said lamp constitutes a cure or remedy or a competent or adequate treatment for . . . ringworm, athlete's foot, acne, eczema, psoriasis" [Par. 1 (b), R. 96].

The validity of these parts of the Findings and Order depends in large part upon proper evaluation, according to the evidence, of the bactericidal action of the "Life Lite" lamp.¹² Such evaluation requires consideration of the extent to which rays from the lamp penetrate the human skin.

Dr. Ayres had little to say about penetration of the skin by the rays, merely volunteering the remark that most of the rays of the light are filtered out by the upper skin layers [R. 140]. Dr. Moor was rather insistent that the rays have very little penetrating power [R. 164, 167], and do not reach below the surface of the skin [R. 167], but,

¹²Throughout all of the discussion in this brief, it should be borne in mind, of course, that the establishment of divisions and subdivisions of the argument is, to some extent, artificial, resulting from the practical necessity of classification by topics, and does not mean that, in fact, any particular chemical or biological effect of the use of Petitioner's product is unrelated to other effects.

upon cross-examination, he admitted that he did not know whether they penetrate deep enough to reach the blood stream [R. 185, 186], nor the exact depth of penetration [R. 188]. He agreed that they have enough penetrating power to produce biologic and photochemical effects [R. 188, 201], and that in regard to bactericidal effect, they do not differ from rays of longer or shorter wave length [R. 188, 189].

Dr. Leighton, on the other hand, went into the subject with care and precision. He discussed the absorption of ultra-violet light by each of the four outer layers of the skin [R. 304-307, 339-343], mentioned that in the spectral range, 2500 to 3050 angstrom units, no marked differences in penetration are found [R. 339], the relative absorption of the four layers at 2537 angstroms being about the same as at 3000 angstroms [R. 342], and stated that the cold quartz lamp was the most efficient source of ultra-violet rays that had yet been developed, as far as bactericidal action was concerned [R. 344]. Ultra-violet light from the sun or from an ideal type of sun lamp would penetrate into the corium layer of the skin [R. 331], and the penetration of rays of 2537 angstroms into that layer would be only about seven-tenths as great as the penetration of rays of 3000 angstroms into that layer [R. 332, 333, 342, 345], but the cold quartz light would be much more efficient in the bactericidal effect [R. 331, 336, 343]. "The net result would be that the bactericidal action of the cold quartz lamp for bacteria in the corium should be greater than that of sunlight for bacteria located in the corium" [R. 343].

Speaking specifically of the diseases last above mentioned, the witnesses again had various opinions to offer.

Ringworm: Dr. Ayres thought that lamps such as Petitioner's would be of "very little" value in ringworm, because the spores of ringworm are very resistant to therapeutic measures [R. 135]. Dr. Moor said, without elaboration: "I doubt if it would be of value in ringworm, although I wouldn't want to be too sure of that" [R. 168]. Dr. Parks testified positively that the lamp was very useful in the treatment of ringworm, because one treatment would usually clear it up [R. 366]; ringworm is fairly common in the Los Angeles area, and one exposure to the cold quartz lamp usually is enough [R. 384, 385].

Athlete's foot: Thomas S. Warren testified without contradiction that he had used the lamp a number of times for treating an athlete's foot condition on his own feet, and had cleared it up every summer when the condition recurred [R. 105, 106]. Dr. Ayres did not believe that the light by itself was likely to produce a cure in a condition like athlete's foot [R. 134], or would be useful in the treatment of athlete's foot [R. 135, 136]. He doubted that it would be of any value [R. 136]. Dr. Moor said it would be of no value, because the organism which produces the fungus which produces athlete's foot has a tendency to burrow deep into the skin [R. 168]. Dr. Parks answered categorically that the lamp is useful in the treatment of athlete's foot and other fungus infections [R. 366]; practically everybody has athlete's foot, and he has found that patients have used this lamp with benefit; he does not even have those patients come to his office, except for the one time to make the diagnosis; it is a relatively chronic disease and rather persistent, and the cold quartz does help; in one case, which had lasted for a

number of months, two treatments with the cold quartz completely eliminated the condition [R. 385, 386].

Acne: Dr. Ayres thought the lamp "would be of very little value" in the treatment of acne; he volunteered an argumentative explanation of the cause of acne, and concluded that he "would say that its effect in acne would be very small," although it "is sometimes used as a supplement to other forms of treatment" [R. 136, 140, 145]. He prescribes the use of cold quartz lamps in his own office, in conjunction with other things, for a limited number of cases of acne [R. 152, 153]. Dr. Moor also would say that the lamp would be "of little value in acne"; "it may produce some slight temporary improvement, but not permanent," in the lessening of the number of pustules, but the best recognized treatment is x-ray therapy [R. 170].¹³ Dr. Parks stated unqualifiedly that the lamp does

Eczema: As to this ailment, also, Dr. Ayres did not believe that the light by itself is likely to produce a cure [R. 134], although it "may be of some temporary value in eczema" [R. 137]. Dr. Moor fell back upon his own preferred formula, saying that the lamp was "not usually considered" of any value in eczema [R. 171], but, upon cross-examination, agreed that if the lamp is used in eczema it is "of especial value in the less acute and more chronic forms" [R. 195, 196]. Dr. Parks pointed out that "chronic eczema" is a rather general term or category, and usually means a condition of unknown cause, but stated flatly that in "most of those instances the therapeutic lamp does relieve the patient and he gets rid of his

¹³Dr. Moor had never used the cold quartz lamp for acne [R. 177].
have use in the treatment of mild acne [R. 366].

eczema. Whatever causes it, you don't know, but it certainly is an adjunct, and in a good many of those cases will completely eradicate the condition [R. 366].

Psoriasis: When asked what would be the therapeutic value of a device such as Petitioner's lamp, Dr. Ayres replied, in part, that "it is particularly beneficial where one desires to secure a prompt erythema without peeling, such, for instance, as in . . . perhaps some cases of psoriasis." He added that he did not believe that the light by itself is likely to produce a cure in conditions like psoriasis [R. 134]. He thought that "an acute case of psoriasis would be definitely aggravated by using ultra-violet light sufficient to produce an erythema. On the other hand, chronic psoriasis, where there are long standing thickened patches, could be definitely benefitted by ultra-violet light of either type, although again I feel the hot quartz is preferable" [R. 138, 145]. Dr. Ayres prescribes the use of cold quartz in his own office, under his own supervision, in conjunction with other things, in a limited number of cases of psoriasis [R. 152, 153]. Dr. Moor, curtly and without explanation, said that "this particular lamp" [with which he was not familiar—R. 161] is of no value in the treatment of psoriasis [R. 171]. Dr. Parks agreed with Dr. Ayres that the lamp should not be used in an acute case, but testified that in a chronic case "it is exceedingly beneficial" [R. 367].

The Commission's Finding, quoted above (pp. 39, 40), is expressly based upon the notion that the rays of the lamp do not penetrate below the surface of the skin. This conclusion completely ignores the general effect of the testimony as a whole, and particularly the testimony of Dr. Leighton, who was so plainly master of his subject that none of the witnesses undertook to contradict him in any

detailed way, and the Commission made no effort to offer any rebuttal. By comparison with the scientific exactness of Dr. Leighton, and the matter-of-fact narration of Dr. Parks based upon his own observations (to say nothing of the various admissions by Drs. Ayres and Moor of the utility of the lamp!), the merely doubting and belittling remarks of Dr. Ayres and the sometimes equivocal, sometimes overpositive statements of Dr. Moor cannot be deemed to constitute any substantial support for the finding.

3. *Sores and Ulcers.*

The Commission found, further [Findings, Par. Seven, R. 91], that: "In the case of sores and ulcers, the lamp may possibly stimulate the healing process but only in those instances in which the infection causing the condition is confined to the surface of the skin." Accordingly, the order required Petitioner to cease and desist from disseminating advertisements representing that its lamp "constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except in so far as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin" [Par. 1 (c), R. 96].

This Finding appears to have been based almost entirely upon the testimony of Dr. Ayres. In his opinion, the bactericidal action of Petitioner's lamp would be confined "chiefly" to staphylococcus and that type of bacteria which is right at the very surface of the skin [R. 134]. In the treatment of bacterial skin diseases, he thought such a device would be "probably of slight benefit" [R. 139]. In those infections which are deeper, and below the surface of the skin, he did not think the lamp would have any

particular value, because most of the rays are filtered out by the upper skin layers [R. 140]. He did not think that it would be "of very much value" in the treatment of sores, "using the term in its general scope" [R. 143]. But he conceded that the lamp might stimulate the formation of new granulation tissues in some ulcerations [R. 135, 140], although "one would have to know what the ulcer was caused by" [R. 138], and stated that he prescribed the use of the cold quartz lamp in his own office, under his own supervision and in conjunction with other things, for certain types of chronic ulcers [R. 152, 153].

Dr. Moor, the other Commission expert, also thought that rays emanating from Petitioner's lamp would be useful "chiefly" for very superficial infections [R. 164], and might be of value in the treatment of sores or ulcers, as a stimulating effect to hasten healing, although, in his opinion, the lamp would not heal them by itself [R. 171]. Dr. Parks testified positively that the lamp has value in the treatment of varicose ulcers [R. 367].

It is noteworthy that both of the Commission's witnesses based their opinions as to the superficiality of the bactericidal effect of the lamp upon their further opinions as to lack of penetration by the rays into the skin [R. 140, 164]. On the other hand, all the witnesses agree that activation of vitamin D in the body is produced by rays from the cold quartz lamp [R. 150, 182, 188, 243, 290, 364], and, according to the uncontradicted and unquestioned testimony of Dr. Leighton, that activation takes place in the corium layer of the skin, which underlies three other distinct layers [R. 304-307]. It is certain, therefore, that at least some of the rays penetrate through at least three layers of the skin and effectively into the fourth, and the above-mentioned opinions of Drs. Ayres and Moor are of little assistance, to say the least.

4. *Bronchitis.*

The Commission found [Findings, Par. Seven, R. 92] that Petitioner's lamp "possesses no therapeutic value in the treatment of . . . bronchitis . . ." and therefore ordered Petitioner to cease and desist from advertising "that said lamp possesses any therapeutic value in the treatment of . . . bronchitis . . ." [Order, Par. 1 (d), R. 96].

The record is practically barren of testimony supporting this Finding. There were merely disparaging remarks by the Commission's experts, such as that the lamp "has a very limited field of usefulness" [R. 134], or that it would be of value in the treatment of impetigo and pityriasis rosea and for its influence on calcium metabolism, but "that would be about the limit" [R. 208], but the only evidence for the Commission expressly relating to bronchitis came from Dr. Moor and his opinion that the lamp would have "no direct effect on bronchitis" [R. 167] was based upon his notion that the rays from the lamp "do not reach below the surface of the skin [R. 167]. As pointed out in the next preceding section of this brief, that premise is not correct. It follows that the Doctor's conclusion is dubious on its face. Moreover, considering his careful phraseology, it seems fair to infer that even he did not care to deny that the *indirect* effects of use of the lamp have therapeutic value in the treatment of bronchitis.

On the other hand, Dr. Parks, on the basis of his own experience and investigation, and not merely theorizing, testified positively that the lamp was a beneficial adjunct in the treatment of bronchitis [R. 365, 381-383].

It is submitted that this condition of the record fails to furnish that substantial support for the finding which is required by the established rule of law (see "Scope of Review," *supra*, pp. 26-30).

5. *Resistance to Disease.*

In connection with the Commission's Finding [Findings, Par. Seven, R. 92] that Petitioner's product "is incapable of building up in the body resistance to disease", and the part of its Order forbidding Petitioner to advertise "that said lamp builds up in the body resistance to disease" [Par. 1 (f), R. 96], it again appears desirable to define the subject-matter of the controversy.

The word "disease" has broad meaning. Funk & Wagnall's New Standard Dictionary of the English Language (1939) gives, among other meanings: "Any departure from, failure in, or perversion of normal physiological action in the material constitution or functional integrity of the living organism. 2. Morbid condition resulting from such disturbance or failure of physiological functions." The definitions in Webster's New International Dictionary, Second Edition, Unabridged (1941), and in The New Century Dictionary (1930), are somewhat differently phrased, but equally as broad.

In view of the wide and general significance of the word, "disease", Petitioner has no desire to advertise that its lamp will build resistance to *all* disease—in fact, in its Brief before the Commission, Petitioner offered, in substance, to limit its advertising in this respect to disease related to calcium-phosphorus metabolism or vitamin D activation—but the effect of the Commission's order is to forbid advertising that Petitioner's product will build re-

sistance to *any* disease, and such an order is devoid of any support whatever in the record.

Dr. Ayres contented himself with brief and cautiously guarded speculation to the effect that the question whether use of the lamp would build such resistance would be difficult to prove, one way or the other [R. 141]. The other Commission expert, Dr. Moor, started bravely [R. 172] by stating that the lamp would have no tendency to build up resistance in the body against disease because ultra-violet radiation had not been shown to have the effect of stimulating formation of white blood cells—a matter not in issue before the Commission—but, upon cross-examination, he admitted that rickets, a calcium deficiency disease, is benefitted by use of cold quartz light [R. 184], that children are debilitated by rickets, and that might predispose them to other diseases (*id.*), that calcium deficiency in the blood gives rise to various nervous and muscular diseases, sometimes including heart disease [R. 183], that calcium deficiency diseases are among the serious diseases with which the human race is afflicted, and calcium deficiency of the blood is corrected to some extent by the use of cold quartz light [R. 183, 184], that it was correct that the use of a cold quartz light frequently would tend to activate in the body vitamin D to the end that the person so using the light would be less apt to have calcium deficiency, and that if we avoid calcium deficiency we are exerting a general prophylaxis in our body to a certain extent [R. 184, 185].

Dr. Truesdail discussed the essential relationship of rickets and vitamin D in children [R. 245-248], said that use of ultra-violet light irradiation as an aid in the prevention of rickets in children is a common practice [R. 255], and pointed out that rickets itself is a specific

disease, but that there are other related diseases, similar to rickets, which are also caused by improper calcium and phosphorus metabolism [R. 253]. When asked whether Petitioner's lamp would have the same effect in preventing rickets and related diseases as natural sunlight would have, he stated that the artificial light is more effective than natural sunlight upon calcium and phosphorus metabolism [R. 254]. Dr. Parks also referred to the use of the cold quartz lamp to produce vitamin D, which helps to improve calcium metabolism, and said further that the lamp is very helpful in diseases like rheumatism and gout, and is useful in convalescence from acute illness [R. 364, 365].

A reading of the evidence relating to this issue would seem to lead to the conclusion that this Finding of the Commission was based upon nothing but its own Complaint.

6. *Chemical Reaction With Respect to the Blood Stream.*

The Complaint alleged that Petitioner had represented that its product "produces a chemical reaction that keeps the blood stream in balance" [Par. Four, R. 6], and alleged further that "said device will not produce a chemical reaction in the body, keep the blood stream in balance, or aid" in other enumerated respects [Par. Five, R. 8]. The Commission found [Findings, Par. Seven, R. 92]: "It does not produce any chemical reaction with respect to the blood stream . . .", and ordered Petitioner to cease and desist from representing ". . . that it produces any chemical reaction with respect to the blood stream . . ." [Order, Par. 1 (g), R. 97]. Petitioner has no further interest in the language relating to "keeping the blood stream in balance", but contends that the quoted parts of the Findings and Order are plainly wrong.

Dr. Ayres was non-committal. His testimony on the point, in full, was as follows [R. 141]:

“Q. In your opinion, would it produce any chemical reaction in the body, so far as the blood is concerned? A. Well, it might perhaps improve the calcium metabolism to some degree. I wouldn’t want to say how much.”

Dr. Moor contributed more testimony, but very little clarification. In his opinion, the use of such a lamp as Petitioner’s would produce a chemical reaction in the body only in the activation of ergosterol in the skin [R. 172]; it really isn’t ergosterol that is activated, but a cholesterol derivative which is activated by ultra-violet rays, chiefly those, however, in the longer range for the production of vitamin D, and vitamin D influences the absorption of calcium and phosphorus from the gastro-intestinal tract and its deposition in bone, especially in children [R. 172]. A few minutes later, he thought that such a device would not have any effect at all upon the blood [R. 174]. Then he conceded that calcium deficiency of the blood is corrected to some extent by the use of cold quartz light [R. 184]. Next, he did not know whether rays emanating from a lamp such as Petitioner’s penetrated into the skin enough to reach the blood stream [R. 185]. When, in discussion of another matter, the term “actinic rays” was used, he defined “actinic” as meaning chemical, a chemical action, and said it would refer to rays of the type emitted by Petitioner’s lamp [R. 196]. Finally, he agreed that on general exposure to ultra-violet radiation there will be produced an increase in the number of leukocytes and blood platelets of the circulating blood and a decrease in the hydrogen ion concentration, coagulation time and eventually in the blood volume [R. 199].

In contrast with the hesitation and apparent confusion of the Commission's experts, Dr. Truesdail pointed out clearly and convincingly that the vitamin D which was created in the skin of the rats used in his experiments with "Life Lite" was actually what governed their calcium and phosphorus metabolism, the effect being that the calcium and phosphorus, which had been present in not only the alimentary tract but also the blood stream, was made available and utilized in forming new bone tissue by forming tri-calcium phosphate [R. 243]; and that the formation of tri-calcium phosphate would certainly be a chemical change, and in his opinion would be so considered by all chemists, including all of the standard instructors and writers upon the subject of which he had any knowledge [R. 243, 244, 249, 252]. Dr. Leighton testified generally to the same effect [R. 290].

It is submitted that the only possible rational conclusion from the record is that use of Petitioner's lamp does produce a chemical reaction—pronounced and beneficial—with respect to the blood stream.

7. Resistance to Infection.

The Commission also found [Findings, Par. Seven, R. 92] that Petitioner's lamp "is incapable of building up the body's resistance to infection . . ." and ordered Petitioner to cease and desist from representing "that said lamp builds up the resistance of the body to infection . . ." [Order, Par. 1 (h), R. 97].

All of the Commission's evidence relating to this point came from Dr. Moor. Upon direct examination, his entire testimony was as follows [R. 166]:

"Q. Would you say that the use of respondent's device would be of any value in the treatment of chronic infections, Doctor? A. Not directly.

Q. Now, will you simplify that? A. Well, if you mean building up resistance to an infection, that is not an accepted action of ultra-violet radiation."

The word "infection" may mean either the act of infecting or the state of being infected (The New Century Dictionary; Webster's New International Dictionary, Second Edition, Unabridged; Funk & Wagnall's New Standard Dictionary of the English Language). From the quoted testimony it appears that the witness regarded "building up resistance" to infection as synonymous with, or a phase of, "treatment" thereof; hence, he must have understood "infection" to mean the state of being infected, for neither medical men nor laymen ordinarily speak of "treating" the act of infecting.

Upon cross-examination, quotations from certain published writings were read to the witness, and he was asked whether or not he agreed with them. He refused to agree with one of them, and stated that his refusal was based upon the fact that to him it had not been proved, and he accepted the position, "not proved", of the Council of Physical Therapy of the American Medical Association [R. 191]. The dialogue then went on [R. 191, 192]:

"Q. Now, let us take (b): 'Increased resistance of the body to infection.' Do you agree that that is true? I mean as to all of these, of course, upon the application of 2537 angstrom units from a device such as the respondent manufactures? A. No, I don't agree with that. Neither is that proven.

Q. Is your disagreement upon that same basis?
A. Yes, sir.

Q. And solely upon that basis? A. Yes, sir."

But surely, the primary objective of innumerable forms of treatment of bacterial infections is to kill the bacteria! And, surely, killing the bacteria helps the body to resist the infection! And Dr. Moor himself said that the rays of cold quartz lamps are bactericidal, more bactericidal than sunlight [R. 163]! In this he was strongly supported by other witnesses [R. 282, 292, 295, 310, 336, 354, 357].

It follows that the statement of this expert witness that it was not proven that rays from lamps such as Petitioner's increased resistance of the body to infection was recklessly worded, to say the least.

8. *Stimulation to the Tissues of the Skin.*

The finding [Findings, Par. Seven, R. 92] that, "Aside from its irritating effect, the lamp affords no stimulation to the tissues of the skin," was followed by a provision in the Order [Par. 1 (i), R. 97] forbidding Petitioner to advertise "that said lamp affords any stimulation to the tissues of the skin in excess of such stimulation as may result from its irritating effect."

The record does not indicate what impelled the Commission to announce this claimed dependency of stimulation upon irritation. It is true that, at one point in his testimony, Dr. Moor characterized rays from cold quartz lamps as more irritating than natural sunlight [R. 163], and it is also true that both Dr. Moor and Dr. Ayres conceded repeatedly that rays from Petitioner's lamp would have a stimulating effect upon the skin [R. 135, 140, 141, 164, 171, 172], but nowhere in the record does it appear that any witness testified that the stimulation and irritation were the same thing, or resulted from each other, or

to any like effect. Dr. Ayre's testimony reflected somewhat his customary belittling attitude toward Petitioner's product [R. 141], but he did not undertake to limit stimulation to irritation. Dr. Moor stated flatly that rays such as are emitted primarily by the lamp would have a bactericidal and stimulating effect upon the skin [R. 164], and that the stimulating effect would change a chronic inflammation into a more acute one, and thereby probably promote healing somewhat [R. 172], but these statements were not directly connected with his remark, above mentioned, comparing irritating effect of the rays with the like effect of natural sunlight.

Perhaps it may be said to be common knowledge that stimulation frequently results from irritation, but it by no means follows that stimulation is impossible without irritation. A cup of coffee, or, for that matter, mere warmth, may confer stimulation, but such an effect is not what is commonly and ordinarily meant by "irritation". The evidence does not give any support at all to this phase of the Findings and Order.

9. *Normalizing Body Chemistry, Improving Metabolism, and Building New Tissues.*

Of course, Petitioner disagrees with the formalistic Findings contained in Paragraphs Seven (last subparagraph) and Nine of the Findings, to the effect that Petitioner's representations had been erroneous, misleading, false, deceitful, etc., but they fall *pro tanto* as the preceding specific Findings, upon which they depend, fail to find support in the record, hence do not require separate dis-

cussion. Leaving them aside, the last of the Findings to be noticed here are in the following words [Par. Seven, R. 92]:

The lamp is incapable of normalizing body chemistry or affecting metabolism, except in so far as its use may activate cholesterol in the skin, resulting in the production of Vitamin D and the consequent absorption and deposition of calcium and phosphorus in the tissues, particularly in the bone tissues. Likewise, any effect which the lamp may have with respect to the building of new tissues is limited to such effect as may result from the production of Vitamin D.

The corresponding provision of the Order [Par. 1 (n), R. 97] forbids Petitioner to advertise "that said lamp normalizes the chemistry of the body, improves metabolism, or builds new tissues, except in so far as its use may result in the production of Vitamin D."

In its brief before the Commission, Petitioner offered, in substance, to limit its claims concerning improvement of metabolism and normalizing of body chemistry to production of such effects in so far as calcium-phosphorus metabolism and vitamin D activation are concerned. Accordingly, the portion of the Findings above quoted is almost, if not quite, satisfactory, and Petitioner's quarrel, at this point, is chiefly with the form of the Order.

As it now reads, the Order forbids Petitioner to make *any* claim of the kind in question, *except* such claims as fall within the vague proviso, "except in so far as its use

may result in the production of vitamin D." Considered literally, this proviso can have only an extremely narrow scope, if it is not entirely meaningless; that is, the production of vitamin D is not itself a part of metabolism, although having a highly important effect upon metabolism, and is not itself a part of the process of building new tissues, although an important factor in actuating such process, hence the proviso can apply only to the normalizing of the chemistry of the body. Such construction would permit Petitioner to advertise only that its lamp would cause production of vitamin D, and nothing more, in spite of the fact that the Findings themselves concede the effects upon metabolism and the building of new tissues.

Of course, it seems likely that the Commission did not have any such intention, but, pursuant to the Findings, intended the proviso to apply, in some unstated way, to all three of the biological effects enumerated in the wording preceding the proviso. Nevertheless, the uncertainty exists, and Petitioner should not be compelled to ascribe its own meaning to the existing language of the proviso, at the risk of being subjected to further litigation and possible heavy penalties (Sec. 45 (1), Title 15, U. S. C. 1940 ed.).

It should be noted, also, that the word "may" in the proviso is inaccurate. The use of Petitioner's lamp, as directed, *does* result in the production of vitamin D, and there is no doubt of it, hence the Order should not insinuate that such result is a mere possibility.

Accordingly, the Order should be corrected to conform to the Findings and the evidence. For example, subparagraph “(n)” of paragraph 1 of the Order could be made to read, “that said lamp normalizes the chemistry of the body, improves metabolism, or builds new tissues, except in so far as such effects are related to the production of vitamin D resulting from use of the lamp.”

10. *Paragraph 3 of the Commission's Order.*

Specification of Error numbered 10 relates to paragraph 3 of the Commission's Order [R. 98]. This paragraph, by its terms, depends in part upon provisions of paragraph 1 hereinbefore discussed. Accordingly, to the extent to which those provisions are set aside or modified by the Court, paragraph 3 should be set aside or modified, unless the Court is of opinion that it is needless, as a matter of necessary implication.

IV.

Conclusion.

Analysis of the material contained in the rather complex record in this case has required, as a matter of practical necessity, that the foregoing discussion be set out under topical headings. This does not mean, of course, that the various parts of the Findings challenged, or the various portions of the testimony referred to, should be considered only piecemeal, to the exclusion of their bearing upon each other. All are interrelated, just as the health of one part of the human body is related to the health of other parts. A brief over-all glance at the case as a whole may be helpful at this point.

The ultimate question is, what shall Petitioner be permitted to say in its advertising? To put it in another way, what wording in advertisements shall be permissible, and what shall be prohibited? Thus, discrimination in choice of words was necessary at all stages of this proceeding. Yet, at the outset, one of the principal difficulties confronting Petitioner, and now confronting the Court, has been and is to ascertain the meaning of some of the phraseology of the Commission's Findings and Order. For example, it seems impossible to derive a definite meaning from subparagraph (n) of paragraph 1 of the Order. This condition of the record itself creates a hazard for Petitioner, which, it is submitted, is not contemplated by the Federal Trade Commission Act.

It is submitted, also, that the issuance of a penal Order of the kind and scope of the one here involved upon such

a flimsy basis as was developed at the hearing before the Commission's trial examiner in this case is likewise without the contemplation of the Act. The Commission produced only two witnesses.¹⁴ Dr. Ayres, a specialist in dermatology, had not even examined the "Life Lite" lamp [R. 145, 146], and Dr. Moor was also unacquainted with it [R. 161]. Dr. Ayres admitted that, as to part of his testimony, he was "merely speculating" [R. 149], and Dr. Moor agreed that he had not had sufficient personal experience in the use of the cold quartz lamp to form a basis for an opinion as an expert witness [R. 193]. Dr. Ayres was opposed to home treatment of any disease without the supervision of a physician [R. 145], and Dr. Moor stated that it was the general philosophy of the medical profession that people should not undertake any health measures, other than eating and sleeping, except on the advice of a physician [R. 175, 176]. A substantial part of the testimony of Dr. Moor was merely a profession of faith in certain published statements of the Council of Physical Therapy of the American Medical Association [R. 177, 178, 180, 191, 192], rather than his own independent opinion. The testimony of both gentlemen abounded in mere general disparagement of Petitioner's lamp, with frequent hesitancy, ambiguities, self-contradiction, false assumptions, evasions and statements based on "general impression" [R. 133]. By contrast, the testimony of the eminently qualified scientists produced by Petitioner, Drs. Truesdail and Leighton, who had themselves actually used the "Life Lite" lamp, evinced a scientific exactitude and careful precision of thought that could hardly fail to

¹⁴It called to the stand, also, the President of Petitioner and a witness produced by Petitioner, but their testimony was not at all helpful to the Commission's case, in so far as the issues here presented are concerned.

carry conviction to an open-minded person. Convincing, also, was the testimony of Dr. Parks, the experienced general practitioner, who did not merely theorize, but described actual cases from his own experience.

To quote from the *Kidder Oil Co.* case, *supra* (117 F. (2d) at page 899):

. . . it occurs to us that the Commission would have discerned the importance, and perhaps the necessity, of making such tests and experiments as would demonstrate, at least to a reasonable certainty, the validity of the charge which it had the burden of sustaining.

But the Commission was content to leave the burden of "tests and experiments" to Petitioner. It did not even bother to have its experts examine the "Life Lite" lamp before the hearing. And when Petitioner concluded presentation of its evidence, including much entirely unanswered testimony concerning the crucial facts in the case, the Commission offered no rebuttal, nor asked for opportunity to offer any.

It is respectfully submitted that the Findings and Order of the Commission, in the respects here challenged, are without substantial support in the evidence, and should be set aside, except where the text of the foregoing discussion indicates that modification is appropriate.

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Attorney for Petitioner.

No. 10218

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

ULTRA-VIOLET PRODUCTS, INC., A CORPORATION, PETITIONER
v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

BRIEF FOR RESPONDENT

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FILED

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10218

ULTRA-VIOLET PRODUCTS, INC., A CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

*ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION*

BRIEF FOR RESPONDENT

I

STATEMENT OF THE CASE

This is an administrative law proceeding arising upon petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent, pursuant to a Commission complaint charging petitioner with engaging in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act.¹

¹ The pertinent provisions of the statute are as follows:

"SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. 111-112; 15 U. S. C. A. § 45 (a).

"(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 52 Stat. 112-113; 15 U. S. C. A. § 45 (c).

"SEC. 12. (a) It shall be unlawful for any person, partnership, or cor-

The complaint (R. 1-12) alleged that petitioner, Ultra-Violet Products, Inc., a California corporation having its principal office and place of business in Los Angeles, California, was engaged in the business of manufacturing and selling in interstate commerce a device called "Life Lite," in connection with which petitioner had disseminated false advertisements by means of the United States mails and in interstate commerce by various means. Petitioner's device, it was alleged, was a cold quartz lamp of the type in which a mercury arc is burned in quartz, and was sold, designed and intended for home use by laymen as an artificial means of obtaining the ultra-violet rays of natural sunlight, and for the prevention, treatment and alleviation of various diseases, ailments and abnormal conditions of the human body (R. 1-2).

Typical examples of the statements and representations contained in petitioner's advertisements were set out in the

poration to disseminate, or cause to be disseminated, any false advertisement—

"(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

"(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

"(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5." 52 Stat. 114-115; 15 U. S. C. A. § 52.

"SEC. 15. For the purposes of sections 12, 13 and 14—

"(a) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. * * *

"(d) The term 'device' * * * means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals." 52 Stat. 116; 15 U. S. C. A. § 55.

complaint (R. 3-6), and it was charged that by their use, and by the use of similar statements and representations not specifically set forth, petitioner had falsely represented that its device was a sun lamp; that it was safe for use in the home for self-treatment without medical supervision; that it would give benefits to the skin and general health comparable to those given by natural sunlight; that the use of the lamp provided a cure, remedy or competent and adequate treatment for chronic, infectious and bacterial skin diseases and ailments, as well as those of fungus origin, and also for asthma, hay fever, bronchitis, colds, sinus trouble, discharges from the ears, barber's itch, ringworm, impetigo, athlete's foot, acne, eczema, psoriasis, shingles, erysipelas, anemia, sores and ulcers; that the use of the device stimulated the tissues of the skin, built up in the body resistance to disease, produced a chemical reaction which kept the blood stream in balance, aided in overcoming a deficiency of white and red corpuscles, produced a tonic effect upon the blood, built up the body's resistance to infection, stimulated the endocrine glands, quieted and soothed the nerves, acted as an antacid, had an alkalizing effect upon the body, improved metabolism, made the body strong, increased vitality, built new tissue, improved mental reactions and the general tone of the body, toned up the nervous system, induced sleep, normalized body chemistry and relieved pain (R. 6-7).

The complaint further alleged that the therapeutic value of petitioner's device was limited to the possible destruction of bacteria on the surface of the skin; that the device did not possess the therapeutic characteristics, and would not accomplish the results or afford users the benefits, claimed in petitioner's advertisements (R. 7-9), and that petitioner's advertisements were also false in that they failed to reveal that the unsupervised use of petitioner's device by persons not trained in its operation, and not skilled in diagnosis, analysis and methods of treatment of diseases, might result in severe burns and other serious and irreparable injury to health (R. 9).

In its answer (R. 12-77) petitioner admitted that it was a California corporation engaged in business in interstate commerce as alleged in the complaint, and that it had advertised

its lamp as there set forth (R. 12-14). It denied, however, that its advertisements were false, misleading or deceptive, denied that the value of its device was limited to the possible destruction of surface bacteria, denied that unsupervised use of the device was dangerous, and affirmatively averred that it would benefit the skin and general health of users as "outlined" in its advertisements (R. 14-15). Petitioner further asserted that "all of the statements, representations, and claims made in its advertisements * * * were made in good faith," and "for the purpose of substantiating" them it cited and quoted excerpts from nineteen articles published in various medical journals (R. 16-18, 20-77). Concluding, petitioner offered to stipulate to discontinue "any further dissemination of such statements, representations and claims as, in the light of present day scientific knowledge, may be contrary to fact," and prayed "an opportunity of presenting briefs in substantiation" of its advertising claims (R. 19).

The matter duly proceeded to trial, and after the taking of evidence on behalf of both the Commission and petitioner, the Commission made its findings as to the facts (R. 77-95), which accord with the allegations of the complaint, concluded that petitioner's practices were in violation of the Federal Trade Commission Act and entered an order to cease and desist (R. 95-98). The only contested provisions of the order are those directing petitioner, in connection with the sale of its Life Lite, to discontinue representing:

(a) that said lamp * * * affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight;

(b) that said lamp constitutes a cure or remedy or a competent or adequate treatment for * * * ring-worm, athlete's foot, acne, eczema, [or] psoriasis * * *;

(c) that said lamp constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except insofar as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin;

(d) that said lamp possesses any therapeutic value in the treatment of * * * bronchitis * * *;

(f) that said lamp builds up in the body resistance to disease;

(g) that said lamp * * * produces any chemical reaction with respect to the blood stream * * *;

(h) that said lamp builds up the resistance of the body to infection * * *;

(i) that said lamp affords any stimulation to the tissues of the skin in excess of such stimulation as may result from its irritating effect;

(n) that said lamp normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use may result in the production of Vitamin D. [R. 96-97.] ²

Petitioner thereafter filed its petition to review (R. 411-415) and statement of points (R. 415-422), challenging the validity of the above quoted provisions of the Commission's order on the ground that the findings upon which they are based are not supported by substantial evidence.

II

QUESTION PRESENTED

The sole question presented is whether there is substantial evidence to support the Commission's findings as to the facts upon which the challenged provisions of its order to cease and desist are based.

III

ARGUMENT

The applicable law is well settled.

The Commission's findings as to the facts if supported by evidence are conclusive. The statute so provides ³ and this

² The quoted provisions are part of paragraph 1 of the order. Petitioner offers no objection to paragraph 2 (R. 97-98) or to paragraph 3 (R. 98), except insofar as the latter is based upon, and prohibits the representations referred to in, the quoted provisions of paragraph 1 (see petitioner's brief, footnote 1, p. 4, and pp. 10, 13, 58).

³ Federal Trade Commission Act, § 5 (c); 52 Stat. 113; 15 U. S. C. A. § 45 (c); *Federal Trade Commission v. Standard Education Society*, 302 U. S.

Court has often so held.⁴ The rule applies notwithstanding the fact that the findings relate to matters as to which there is a conflict in expert medical testimony,⁵ for the credibility of the witnesses and the weight to be accorded to the evidence are for the Commission, as the fact finding body, to determine,⁶

112, 117 (1937); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73 (1934); *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927).

⁴ *Stanley Laboratories v. Federal Trade Commission*, 138 F. 2d 388, 393 (C. C. A. 9th, 1943); *American Medicinal Products v. Federal Trade Commission*, 136 F. 2d 426, 427 (C. C. A. 9th, 1943); *Lane v. Federal Trade Commission*, 130 F. 2d 48, 50 (C. C. A. 9th, 1942); *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Electro Thermal Co. v. Federal Trade Commission*, 91 F. 2d 477, 479 (C. C. A. 9th, 1937), cert. denied 302 U. S. 748 (1937).

⁵ *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85, 86 (C. C. A. 9th, 1942), cert. denied 317 U. S. 679 (1942); *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *D. D. D. Corporation v. Federal Trade Commission*, 125 F. 2d 679, 680-682 (C. C. A. 7th, 1942); *Neff v. Federal Trade Commission*, 117 F. 2d 495, 497 (C. C. A. 4th, 1941); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F. 2d 886, 887 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935).

Although not apparent from the opinions, the rule was also applied in *Federal Trade Commission v. Raladam Company*, 316 U. S. 149 (1942), *American Medicinal Products v. Federal Trade Commission*, 136 F. 2d 426 (C. C. A. 9th, 1943), *Philip R. Park, Inc. v. Federal Trade Commission*, 136 F. 2d 428 (C. C. A. 9th, 1943), and a number of other cases, in which there was a sharp and substantial conflict in expert testimony as to the therapeutic value of medical preparations. Such a conflict likewise existed in *Federal Trade Commission v. Raladam Company*, 283 U. S. 643, 646 (1931), as is apparent from the decision below (42 F. 2d at 433-435), and while the Commission's order was set aside on substantive grounds not here material, the Court stated that its findings were warranted by the evidence.

⁶ *Glasser v. United States*, 315 U. S. 60, 80 (1942); *National Labor Relations Board v. Link-Belt Company*, 311 U. S. 584, 597 (1941); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 567 (1931); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *Keller v. Federal Trade Commission*, 132 F. 2d 59, 60-61 (C. C. A. 7th, 1942); *Banning v. United States*, 130 F. 2d 330, 335 (C. C. A. 6th, 1942), cert. denied 317 U. S. 695 (1943); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Wholesale Grocers' Assn. v. Federal Trade Commission*, 277 F. 657, 663 (C. C. A. 5th, 1922).

This Court has frequently held that it is for the jury, or the court below in the absence of a jury, to pass upon the credibility and the weight

and petitioner cannot ask the Court to "pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission." *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 117 (1937). In the circumstances, a critical discussion of the evidence relied upon by petitioner in support of its advertising claims is unnecessary. It is sufficient to point to the evidence which supports the Commission's findings, for if the findings are supported by evidence, they will be upheld "regardless of the evidence on the other side," *National Labor Relations Board v. Hudson Motor Car Co.*, 128 F. 2d 528, 532 (C. C. A. 6th, 1942); *National Labor Relations Board v. J. G. Boswell Co.*, 136 F. 2d 585, 589-590 (C. C. A. 9th, 1943), and the fact that petitioner offered experts who testified contrary to the experts offered on behalf of the Commission "cannot enable the petitioner to contend successfully that there was no substantial evidence to support the Commission's findings." *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942).⁷

The Commission's findings in this case are based upon the testimony of two well qualified experts, Dr. Samuel Ayres, Jr. and Dr. Fred B. Moor.

Dr. Ayres is one of the most prominent skin specialists in the City of Los Angeles and is well known throughout the United States (R. 208). He obtained the degrees of Bachelor of Arts from the University of Missouri in 1915, and of Doctor of Medicine from Harvard Medical School in 1919. He interned at Massachusetts General Hospital, where he was also graduate assistant in dermatology for six months, and has practiced in Los Angeles as a skin specialist since 1920 (R. 129). Dr. Ayres has used ultra-violet light in his practice for over twenty years

of the testimony of expert medical witnesses. *E. g.*, *Cherry-Burrell Co. v. Thatcher*, 107 F. 2d 65, 69 (C. C. A. 9th, 1939); *United States v. Alger*, 68 F. 2d 592 (C. C. A. 9th, 1934); *United States v. Dudley*, 64 F. 2d 743, 745 (C. C. A. 9th, 1933); *United States v. Albano*, 63 F. 2d 677, 681 (C. C. A. 9th, 1933); *United States Fidelity & Guaranty Co. v. Leong Dung Dye*, 52 F. 2d 567, 570 (C. C. A. 9th, 1931), cert. denied 285 U. S. 537 (1932).

⁷ The cases cited in footnote 5, *supra* p. 6, are to the same effect.

(R. 146), and a lamp of the same type as petitioner's Life Lite lamp for eight or ten years (R. 129).

Dr. Moor also practices in Los Angeles (R. 155). He is a graduate of the University of North Dakota and the College of Medical Evangelists, and has specialized in pharmacology, therapeutics and physical therapy for twenty years (R. 156).⁸ He has also had experience in internal medicine, and has taught pharmacology and therapeutics at the College of Medical Evangelists since 1921 (R. 156-157). Dr. Moor is a consultant of the Council of Physical Therapy of the American Medical Association, Vice President of the American Congress of Physical Therapists, a member of the examining board of physical therapy technicians for the American Register of Physical Therapy Technicians and director of the physical therapy department of White Memorial Hospital of Los Angeles (R. 156, 206). He has used lamps of the Life Lite type for four or five years, and he showed himself to be well informed on the subjects of sun lamps, therapeutic lamps, and ultra-violet rays (R. 157-164, 205-209).

In its brief petitioner emphasizes the fact that neither of the Commission's experts had used its Life Lite. That, however, did not disqualify them from expressing an opinion upon its therapeutic value and effect, nor does it furnish any basis for a contention that their testimony was not substantial.⁹ Their general medical knowledge qualified them to testify, and each, as stated above, was thoroughly familiar with and had used in his practice for several years cold quartz lamps of the same type as petitioner's Life Lite (R. 129, 146, 163, 208-209).

⁸ Physical therapy, sometimes called physiatrics or physiotherapy, is the treatment of disease by physical, non-medical means, such as heat, massage, water, radiation and electricity. See Dorland, *The American Illustrated Medical Dictionary* (18th ed. 1938), and Stedman's *Medical Dictionary* (14th rev. ed. 1939).

⁹ *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85, 86 (C. C. A. 9th, 1942), cert. denied 317 U. S. 679 (1942); *Neff v. Federal Trade Commission*, 117 F. 2d 495, 496-497 (C. C. A. 4th, 1941); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *Goodwin v. United States*, 2 F. 2d 200, 201 (C. C. A. 6th, 1924); *Kershaw v. Tilbury*, 214 Cal. 679, 8 P. 2d 109, 114-115 (1932).

The expert witnesses called by petitioner were Dr. Roger W. Truesdail, Dr. Philip A. Leighton and Dr. Floyd Roswell Parks. Since, as we shall show, the testimony of the Commission's experts fully supports the Commission's findings, no discussion of the testimony of petitioner's experts is required. Actually, the conflicts between the witnesses were not as substantial as might be inferred from petitioner's brief, but to the extent that their testimony did conflict, the Commission's action in accepting the views of the experts offered on its behalf was entirely reasonable, for while petitioner's experts were undoubtedly well educated and able gentlemen, Dr. Parks was the only one who was a medical doctor or who was shown to have had any medical training or experience. He was a surgeon, however, rather than a dermatologist or physiotherapist (R. 358, 372, 374, 387),¹⁰ and his testimony as a whole evidenced no great familiarity on his part with the use and effect of ultra-violet rays. Dr. Truesdail and Dr. Leighton were chemists (R. 209-210, 266); and neither was shown to have had any training or experience whatever in medicine, dermatology or physiotherapy.

There is no conflict in the evidence as to the physical, as distinguished from the therapeutic, characteristics and nature of petitioner's Life Lite. There are two models, the stand lamp and the hand lamp (R. 102), each being sold with printed directions for use (Comm. Exs. 1 and 2, R. 402-404), and being designed and intended for home use by laymen without medical supervision (R. 128). The hand lamp is intended to be used at a distance of about one inch from the body (R. 106), and may be moved from one part of the body to another (R. 107). If held still at that distance it will produce a first-degree erythema, or redness, akin to sunburn, in ten or twelve seconds (R. 107).¹¹ The stand lamp is intended to be used at a dis-

¹⁰ As pointed out above, the Commission's experts were specialists in the matters under inquiry, Dr. Ayres being a dermatologist (R. 129) and Dr. Moor a physiotherapist (R. 156), and "The testimony of a specialist is entitled to greater weight than that of a general practitioner." Rogers, *Expert Testimony* (3rd ed. 1941) 788.

¹¹ In footnote 8 on page 33 of its brief petitioner says that "Erythema is the medical term for sun burn," citing R. 108. Petitioner's president did testify to that effect, but since there is an issue as to whether petitioner's

tance of from twenty to twenty-four inches from the body (R. 108-109). At this distance some of the stand lamps will produce an erythema in about one minute on the body of a person who is not tanned, others in from one and a half to two minutes (R. 110). Goggles are furnished for use with the lamps (Comm. Ex. 1, R. 402) and each is equipped with an automatic clock which can be set for any period between a half minute and six minutes (R. 111-112).

Both the hand lamp and the stand lamp are the cold quartz type of ultra-violet lamp (R. 113) and are made by bending a quartz tube into the shape desired, removing all gases, and then filling it with a mixture of helium, argon, neon and krypton, under pressure. A few drops of mercury are added, and the tube is then sealed, usually hermetically. When an appropriate voltage is applied to the tube, the ionization of the mercury vapor inside produces a high intensity of ultra-violet light located primarily in the spectral range of 2537 angstrom units (R. 113). An angstrom unit is one fifty-second millionth of an inch, and is one of the units of measurement of the electromagnetic spectrum (R. 119). The spectral range of the sun is from about 2910 to approximately 50,000 angstrom units (R. 158), very few of its rays being below 2900 angstroms (R. 323). The spectral range of petitioner's Life Lite is from about 2537 to 3660 angstrom units, 89.2% of its total energy output, however, being concentrated at about 2537 angstroms (R. 119-120), well below the lowest point in the spectral range of the sun.¹²

Ultra-violet lamps are classified generally as therapeutic lamps and sun lamps, depending upon their spectral range,

lamp is comparable to natural sunlight, we might point out that his definition is not exactly accurate. Speaking generally, erythema is a "morbid redness of the skin." It has many causes and there are many varieties of it. "Erythema solaris" is the medical term for sunburn, and while the redness produced by petitioner's lamp is akin to sunburn, it is not erythema solaris. See the definitions of "erythema" in Dorland, *The American Illustrated Medical Dictionary* (18th ed. 1938), and *Stedman's Medical Dictionary* (14th rev. ed. 1939).

¹² It is not clear from the evidence whether the output of petitioner's lamp is concentrated at 2537 or at 2540 angstroms, but it was shown that there was no appreciable difference between the two wave-lengths (R. 268, 325).

a sun lamp being one which, speaking approximately, reproduces the spectrum of the sun and emits no wave lengths shorter than 2900 angstroms; a lamp which reproduces shorter wave lengths is a therapeutic lamp (R. 123-124, 279, 292, 325-327). Therapeutic lamps produce redness but do not tan the skin (R. 131-132). Sun lamps do tan (R. 294), and, as Dr. Ayres testified for the Commission, "the tanning procedure * * * is considered to be intimately connected with certain of the benefits of the natural sun" (R. 133). The rays of a therapeutic lamp are also "markedly irritating," for which reason a sun lamp is more suitable for use by laymen (R. 160). It is undisputed that petitioner's lamp is a therapeutic lamp rather than a sun lamp (R. 125, 131, 159, 327).

Speaking generally, Dr. Moor testified for the Commission that petitioner's Life Lite was "Useful chiefly for very superficial infections and * * * to produce irritation of the skin" (R. 164), and that its "only well proven effect" was to aid in maintaining calcium and phosphorous, inhibiting rickets (R. 173), and treating pityriasis rosea (R. 208).¹³ The Commission's other expert, Dr. Ayres, said that petitioner's lamp was "useful in the treatment of several skin diseases," but that it had a "very limited field of usefulness" and that he did not believe the "light by itself is likely to produce a cure in conditions like psoriasis or eczema or athlete's foot" (R. 134). Dr. Truesdail, one of petitioner's experts, testified that the "only chemical effect" of Life Lite (R. 254) is to cause "the utilization of the calcium and phosphorous that is going through the alimentary tract of the body" (R. 252).

This evidence alone, we think, fully warranted the Commission's findings, but there was specific testimony in support of each of the nine findings questioned by petitioner.

Benefits Comparable to Those of Sunlight

The Commission charged that since the ultra-violet rays emitted by petitioner's Life Lite were not "comparable to the

¹³ Pityriasis rosea is an inflammatory disease of the skin, marked by an eruption of patches of varying size, of a pink color and covered with whitish scales. See Dorland, *The American Illustrated Medical Dictionary* (18th ed. 1938); *Stedman's Medical Dictionary* (14th rev. ed. 1939).

ultraviolet rays emitted by natural sunlight," the benefits "to the skin and to the general health" to be derived from petitioner's lamp and those to be derived from natural sunlight were not "comparable" (R. 7-8), and it found that, for the reason stated, such benefits "cannot properly be compared" (R. 91). Accordingly, the Commission ordered petitioner to cease and desist representing that its lamp "affords benefits to the skin or to the general health of the user comparable to those afforded by natural sunlight" (R. 96).

Upon "close consideration," and with the aid of dictionaries, petitioner professes to discover "an ambiguity of potential importance" lurking in this provision of the Commission's order (petitioner's brief, p. 31). Pointing out that the word "comparable" may mean either "*capable* of being compared" or "*worthy* of comparison" (*ibid.*), petitioner contends that it is not clear in which sense the Commission used the term, and argues that it was used in the former sense in the complaint and findings, for which reason it must be ascribed the same meaning in the order, and the order is therefore absurd or "did not follow the Complaint and Findings, and hence was improvident, and should be annulled" (*id.*, pp. 32-33).

We hesitate to believe that counsel advances this argument seriously. The order would, indeed, be absurd if "comparable" were used in the sense of *capable* of being compared, for no two things on earth are incapable of comparison in the sense of being examined for the purpose of discovering their resemblance or differences. That being true, petitioner's argument is self-destructive, for when words are susceptible of two meanings, one reasonable and the other absurd, they are to be given a reasonable meaning. See 35 C. J. 501-502; 49 C. J. 105-107.

We submit, however, that the Commission's complaint, findings and order are not susceptible of the meaning ascribed to them by petitioner.

Petitioner states, and we agree, that the word "'comparable' was used in the Order in the same sense" in which it was used in the complaint and findings (petitioner's brief, p. 33), and we think it perfectly clear that as there used the word meant

worthy of comparison, like or similar to.¹⁴ This is obvious not only from the expression employed, namely, "comparable to," rather than "comparable with,"¹⁵ but also from the context in which the expression was used. The complaint charged, and petitioner admitted in its answer, that petitioner's Life Lite was "sold, designed and intended * * * as an artificial means of obtaining the ultraviolet rays of natural sunlight" (R. 2, 13), and the plain meaning of the complaint and findings was that the benefits to be derived from the use of petitioner's lamp were neither the same as, nor sufficiently valuable to be worthy of comparison with, the benefits to be derived from the sun (R. 6, 7-8, 83, 90-91). Petitioner evidently had no doubt as to the meaning of the word "comparable" as used four times in the complaint (R. 6, 7, 8), for it answered without moving the Commission to make the complaint more definite and certain, and we believe that petitioner understands equally well the meaning of the word as used in the Commission's findings and order.

As for the evidence, it is undisputed that petitioner's Life Lite does not reproduce the spectrum of the sun and is not a sun lamp (*supra* pp. 10-11). In addition to this, Dr. Ayres testified that in his opinion Life Lite would not give benefits to the skin or general health comparable to those given by natural sunlight (R. 132-133, 148-149), and Dr. Moor said that the rays emanating from petitioner's lamp and from the sun "do not have the same biological effects" (R. 163, 182). Petitioner's own expert, Dr. Leighton, testified that there were "relative differences" between such rays, and that "certain wave lengths will be more * * * efficient for one thing, and other wave lengths will be more efficient for another" (R. 289).

¹⁴ This is the primary meaning of the term, as indicated by the words given as synonyms for "comparable" in Webster's Dictionary of Synonyms (1912), namely, "Analogous, akin, parallel, similar, like, alike, identical, homogeneous, uniform."

¹⁵ In Webster's New International Dictionary (2nd ed., Unabridged, 1940), "comparable" is defined as follows: "Capable of being compared (with); worthy of comparison (to)."

Ringworm, Athlete's Foot, Acne, Eczema and Psoriasis

The Commission found as a fact that:

While ultra-violet rays of the wave length emitted by [petitioner's] lamp possess bactericidal properties, such properties are effective only in those cases where the infection sought to be attacked is limited to the surface of the skin. The rays are incapable of penetrating the surface of the skin and destroying bacteria or fungi present below the surface. The use of [petitioner's] lamp therefore does not constitute a cure or remedy or a competent or adequate treatment for such conditions as barber's itch, ringworm, athlete's foot, acne, eczema, psoriasis, shingles, or erysipelas, all of which are due to causes existing below the surface of the skin. [R. 91.]

Petitioner was accordingly ordered to discontinue representing that its lamp constitutes a "cure or remedy or a competent or adequate treatment" for the conditions referred to (R. 96).

The Commission's findings and order are not questioned insofar as they relate to barber's itch, shingles and erysipelas, but they are challenged as to ringworm, athlete's foot, acne, eczema and psoriasis (petitioner's brief, pp. 39-45). Petitioner's argument, however, is almost completely beside the point, for while it asserts that there was no substantial evidence to support the Commission's finding, it actually cites enough of the testimony of the Commission's experts to show that the finding was fully warranted. It will also be noted that none of the testimony of petitioner's experts was contrary to the Commission's conclusion as to the efficacy of petitioner's Life Lite, for the Commission's finding was that the device was not a "cure or remedy or a competent or adequate treatment" (R. 91), whereas the testimony relied on by petitioner was, in substance, merely to the effect that petitioner's Life Lite was "useful," "helpful" or "beneficial" as an "adjunct" in the treatment of the conditions in question. Nothing in the Commission's order prohibits petitioner from truthfully stating the limited therapeutic value of its lamp—what the order prohibits is the

broad and comprehensive representation that petitioner's lamp is a "cure or remedy or a competent or adequate treatment." There was ample evidence that petitioner's representations to that effect were false.

Dr. Ayres testified that petitioner's lamp was "useful in the treatment of several skin diseases," but he said that its bactericidal action was limited to "that type of bacteria which is right at the very surface of the skin" (R. 134), because "most of the rays of the light are filtered out by the upper skin layers" (R. 140). That being true, Dr. Ayres did not "believe the light by itself is likely to produce a cure in conditions like psoriasis or eczema or athlete's foot, or things of that sort" (R. 134, 135, 143-144).

Dr. Ayres further testified that Life Lite would be of "very little" value in treating ringworm (R. 135) and was "not a proper means of treating athlete's foot" (R. 136). He said that "its effect in acne would be very small," and it would be of "very little value in the treatment of acne," because it would not reach the underlying cause of the condition (R. 136, 145). Eczema, Dr. Ayres said, was "simply a symptom of a disease of the skin," that "without finding out the underlying cause, it is perfectly futile to try to treat it," and while Life Lite might "be of some temporary value in eczema" it would not "effect a cure" (R. 137).

As for psoriasis, Dr. Ayres said that it was "another skin condition, the cause of which is entirely unknown;" that a case of "chronic psoriasis" would be "definitely benefited by ultraviolet light," but "an acute case of psoriasis would be definitely aggravated," and since a layman could not diagnose the different types of psoriasis, petitioner's lamp should not be used in the treatment of the condition except under a physician's supervision (R. 138).

Dr. Moor testified that the rays of petitioner's Life Lite "have very little penetrating power" (R. 164, 167), that their bactericidal effect would be superficial, limited to "organisms * * * on the surface" of the skin, and that the lamp was "Useful chiefly for very superficial infections and * * * to produce irritation of the skin" (R. 164). He stated that he doubted whether Life Lite "would be of value in ringworm, al-

though I wouldn't want to be too sure" (R. 168), but said that it was of "No value" in treating athlete's foot (R. 168, 169-170), possessed "little value in acne" (R. 170), that it was "Not usually considered of any value in eczema" and was of "no value" in treating psoriasis (R. 171).

Sores and Ulcers

The Commission found that in the case of sores and ulcers petitioner's lamp "may possibly stimulate the healing process but only in those instances in which the infection causing the condition is confined to the surface of the skin" (R. 91-92). Petitioner was therefore ordered to cease and desist representing that Life Lite

constitutes a cure or remedy for sores or ulcers, or that it constitutes a competent treatment therefor except insofar as it may stimulate the healing process in those cases in which the infection causing such conditions is confined to the surface of the skin. [R. 96.]

Dr. Ayres testified that he knew of no "chronic skin condition which would be improved * * * or benefited" by petitioner's lamp except to the extent that the lamp might have a "stimulating effect, such as perhaps in the case of a chronic ulcer, but I doubt very much if the light by itself would be sufficient to bring about a cure in even such a condition" (R. 135). He said that it would "Very definitely" be "necessary to have the diagnosis of a physician" before using petitioner's lamp in the treatment of sores and ulcers (R. 139), for the reason that, while the lamp

might be of some value in the treatment of certain chronic ulcers, by way of stimulating cicatrization,¹⁶ * * * one would have to know what the ulcer was caused by. You could have an ulcer due to syphilis and no amount of light would do it any good. Or you may have an ulcer due to cancer and the use of the light might even aggravate it. [R. 138-139.]

¹⁶ Cicatrization is "A healing process which leaves a scar or cicatrix." Dorland, *The American Illustrated Medical Dictionary* (18th ed. 1938); Stedman's *Medical Dictionary* (14th rev. ed. 1939).

As for sores, "using the term in its general scope," Dr. Ayres did not think petitioner's lamp "would be of very much value" in their treatment (R. 143).

Dr. Moor testified that petitioner's Life Lite might "hasten healing" of sores and ulcers because of its "stimulating effect," but it would not "heal" them "by itself" (R. 171).

Petitioner argues that this testimony is not substantial because it is based on Dr. Ayres' and Dr. Moor's opinion that the rays of petitioner's lamp would not penetrate beneath the surface of the skin, whereas they agreed that the lamp activated vitamin D, and, according to the testimony of Dr. Leighton, one of petitioner's experts, such "activation takes place in the corium layer of the skin, which underlies three other distinct layers" (petitioner's brief, p. 46). There is no merit to this contention for three obvious reasons.

First, it is common knowledge that infections causing sores and ulcers are usually found in the subcutaneous tissue *below* the skin. Second, in agreeing that petitioner's lamp activated vitamin D, Dr. Ayres and Dr. Moor did *not* agree that the lamp's rays possessed the penetrating power ascribed to them by Dr. Leighton, who himself frankly conceded, in effect, that there is "sometimes doubt" as to the layer of the skin in which vitamin D activation is induced (R. 307).¹⁷ Third, from the fact that petitioner's Life Lite might penetrate the skin to a sufficient depth to activate vitamin D, it by no means follows that its "radiation strikes the blood stream" (R. 186), or, if so, that the rays of the lamp possess bactericidal properties at that depth.¹⁸

¹⁷ Dr. Leighton explained that it was the exposure of ergosterol and cholesterol, and possibly other sterols, to ultra-violet radiation which produced increased vitamin D activity (R. 346-348), and, if we correctly understand his testimony, he acknowledged that there was some doubt as to just which sterol, if any, was found in any particular layer of skin (R. 307). Dr. Moor testified that "vitamin D is manufactured somewhere in [the] superficial layer of the skin" (R. 186).

¹⁸ It is undisputed that ultra-violet rays of different wave lengths have different therapeutic values and differ in their penetrating qualities (R. 131-132, 159-160, 163, 289, 303-310, 333-336, 340-345; Res. Ex. 2, R. 271; Res. Ex. 3, R. 287).

In giving his testimony at R. 303-307 relative to the absorption of ultra-violet rays by different layers of the skin, Dr. Leighton was speaking of

Bronchitis

The Commission found that, contrary to petitioner's representations, its lamp "possesses no therapeutic value in the treatment of asthma, hay fever, bronchitis, colds, sinus trouble, or discharges from the ears" (R. 92), and ordered petitioner to discontinue advertising otherwise (R. 96). Petitioner objects to the finding and order insofar as they relate to bronchitis on the ground that one of its experts testified that its lamp "was a beneficial adjunct in the treatment of bronchitis," and the testimony in support of the finding and order "was based upon [Dr. Moor's] notion that the rays from [petitioner's] lamp 'do not reach below the surface of the skin'" (petitioner's brief, pp. 47-48).

Neither argument requires discussion. The Commission was not bound to accept as true the testimony of petitioner's expert, and Dr. Moor's view that petitioner's lamp possessed little penetrating power was not only substantial in itself, but was fully corroborated by the testimony of Dr. Ayres (R. 134-135, 140). ~~As for the evidence,~~ Dr. Moor said that bronchitis was "commonly caused by germs in the respiratory tract," that petitioner's lamp did not possess sufficient penetrating power to reach the source of the infection, and had "No direct effect on bronchitis" (R. 167).

the absorption qualities of each layer considered individually, and did not testify "with consideration to the fact that the ultra-violet light would travel through some other" layer or substance (R. 307). We have not overlooked this testimony, but we place no particular emphasis on it for the reason that Dr. Leighton subsequently testified that in his opinion, and contrary to the opinions of Dr. Ayres and Dr. Moor, the rays of petitioner's lamp would penetrate through the outer layers of the skin and possess bactericidal properties in the "fourth layer down" (R. 331, 339, 343). In this connection, however, it is interesting to note that in its directions for use petitioner states, "The ultra-violet rays have very slight penetration and for this reason it is desirable to treat that part of the body in which the blood stream is closest to the surface. * * * It is advisable to take treatments in a warm room, as the blood will be closer to the surface of the body than when exposed to a chilly temperature. Under these conditions it is possible to receive a much better reaction than if the cold air is striking the skin and causing the blood to remain in the deeper tissues" (Comm. Ex. 1, R. 402).

Resistance to Disease

The Commission found that petitioner's lamp "is incapable of building up in the body resistance to disease" (R. 92) and ordered petitioner not to represent that it would do so (R. 96). The finding and order are supported by the testimony of both Dr. Ayres and Dr. Moor.

Dr. Ayres said that "from the best opinions that I have been able to find" resistance against disease "was 'more apt to be built up under conditions of radiation simulating the natural sunlight' than by the rays of petitioner's lamp (R. 141), and that a person who used petitioner's lamp 'habitually * * * for a considerable period of time' would not be 'less apt to develop a skin disorder than one who did not subject his skin to such treatment'" (R. 146).

Dr. Moor testified that "building up resistance to an infection * * * is not an accepted action of ultra-violet radiation" (R. 166, 167), and that building "resistance against disease means a stimulation of antibody¹⁹ formation * * * and ultra-violet radiation has not been shown to have that effect" (R. 172). Asked directly whether petitioner's Life Lite would "have any tendency to build up resistance in the body against disease," he answered unequivocally, "No" (R. 172).

Notwithstanding this evidence, petitioner attacks this part of the Commission's order on the ground that since it is conceded that Life Lite will frequently so activate the production of vitamin D as to prevent or remedy calcium deficiency diseases, the order is too broad because it forbids petitioner to advertise that its lamp "will build resistance to *any* disease" (petitioner's brief, pp. 48-49). As pointed out above, however, the phrase "building resistance to disease" means "a stimulation of antibody formation" (R. 172), and vitamin D and calcium are not antibodies. Petitioner, moreover, did not confine its advertising claims to calcium deficiency diseases—it broadly represented

¹⁹ An antibody is "Any substance in the blood-serum or other fluids of the body which exerts a specific restrictive or destructive action on bacteria or other noxa, or neutralizes their toxin * * *." Stedman's Medical Dictionary (14th rev. ed. 1939).

that Life Lite would "build resistance against disease" in general (Comm. Ex. 21, R. 410),²⁰ which it will not do. The Commission was therefore fully warranted in unqualifiedly prohibiting that broad and general representation,²¹ which is all that its order does prohibit. There is nothing in the order which forbids petitioner from truthfully representing the extent to which its lamp may tend to build resistance against any *specific* disease caused by vitamin D deficiency.

Chemical Reaction with Respect to the Blood Stream

The Commission found that petitioner's lamp "does not produce any chemical reaction with respect to the blood stream, nor is it of any assistance in overcoming a deficiency of either white or red corpuscles. It has no tonic effect upon the blood" (R. 92). Accordingly, petitioner was ordered to discontinue its representations to the contrary (R. 97).

Pointing to inapposite fragments of Dr. Moor's testimony (petitioner's brief, p. 51) and citing certain testimony of its own experts relating to the formation of tri-calcium phosphate (*id.*, p. 52), petitioner challenges the order insofar as it prohibits the representation that Life Lite "produces any chemical reaction with respect to the blood stream" (R. 97). Contrary to the implication of petitioner's brief, however, none of the testimony referred to is opposed to the Commission's finding.

Dr. Truesdail, one of petitioner's experts, said that his experience with rats showed that petitioner's lamp would activate the production of vitamin D "in the skin" (R. 243), and that vitamin D was "a catalyst"²² which "causes the utilization of

²⁰ In Comm. Ex. 25-A (not printed) petitioner represented that the "improved tone of the body" resulting from the use of Life Lite "constitutes a power to resist the invasion of disease," and in Comm. Ex. 31 (not printed) it said that the effect of Life Lite "extends to the whole body system," "builds direct resistance to infection" and increases "the general resistance."

²¹ See *Lane v. Federal Trade Commission*, 130 F. 2d 48, 51-52 (C. C. A. 9th, 1942); *Macher v. Federal Trade Commission*, 126 F. 2d 420 (C. C. A. 2nd, 1942); *Century Metalcraft Corp. v. Federal Trade Commission*, 112 F. 2d 443, 446-447 (C. C. A. 7th, 1940).

²² A catalyst is an agent which produces a reaction without itself entering into the reaction. Dorland, *The American Illustrated Medical Dictionary* (18th ed 1938); *Stedman's Medical Dictionary* (14th rev. ed. 1939).

the calcium and phosphorous" (R. 252, 257) present in the alimentary tract and the blood stream (R. 243, 252). This, Dr. Truesdail testified, was a chemical change *in the body*, resulting in "forming new bone tissue by forming tri-calcium phosphate" (R. 243, 249). He said that the

specific chemical reaction [resulting from the use of petitioner's device] would be a catalytic effect, which would permit the union of calcium and phosphorous ions to produce the chemical compound tri-calcium phosphate in the bones. [R. 249.]

And this, he declared, was the "only chemical effect" petitioner's lamp would have (R. 254). As petitioner states, "Dr. Leighton testified generally to the same effect (R. 290)" (petitioner's brief, p. 52).

This testimony supports, rather than opposes, the Commission's finding that petitioner's lamp produces no chemical reaction with respect to the blood stream. The finding is also supported by the testimony of Dr. Ayres and Dr. Moor, the Commission's experts.

Dr. Ayres was asked generally whether petitioner's lamp would "produce any chemical reaction in the body, so far as the blood is concerned," and replied that "it might perhaps improve the calcium metabolism to some degree" (R. 141). Dr. Moor stated that the *only* chemical reaction in the body to be derived from the use of Life Lite was the activation of vitamin D, which "influences the absorption of calcium and phosphorous" (R. 172). He testified that the lamp would not "keep the blood stream in balance" or "aid in overcoming a deficiency of the white or red corpuscles" (R. 173), and that it would not "produce a tonic effect on the blood" (R. 174). When asked specifically whether the lamp would "have any effect at all upon the blood," he replied unequivocally, "No" (R. 174).²³

²³ In view of Dr. Moor's clear and specific testimony, petitioner cannot detract from its substantiality, as it attempts at page 51 of its brief, by combining bits and pieces of his testimony removed from their context. For example, petitioner refers to Dr. Moor's testimony that the use of Life Lite corrects "calcium deficiency of the blood" to some extent (R. 184). But Dr. Moor did not mean by that that petitioner's lamp produced a chemical reac-

There is nothing in the Commission's order which prohibits petitioner from truthfully advertising the effect of its lamp upon the utilization of calcium and phosphorous in the blood stream, but that effect does not constitute a "chemical reaction with respect to the blood stream," and the evidence fully warranted the Commission in ordering petitioner not to represent that such a reaction was produced by its lamp.

Resistance to Infection

The Commission found that petitioner's lamp "is incapable of building up the body's resistance to infection" (R. 92), and ordered petitioner to cease representing that it would do so (R. 97). Petitioner contends that the finding is unwarranted because in testifying that petitioner's lamp was ineffective for "building up resistance to an infection," Dr. Moor, one of the Commission's experts, employed the phrase "building up resistance" to infection as meaning "treating" infection,²⁴ and for the further reason that it was conceded that petitioner's lamp had a bactericidal effect, and "killing * * * bacteria," so

tion in the blood stream. He only meant that, by causing the production of vitamin D, the lamp had the effect of improving the "calcium metabolism" (R. 182-183), which "involves the deposition * * * in the bone structure" of the calcium present "in all tissues of the body" (R. 183). Petitioner also points to the fact that Dr. Moor agreed that "general exposure to ultra-violet radiation" would produce certain changes in the blood. But petitioner can take no comfort from that, for the spectral range of its lamp is so limited that exposure to its rays is not "general exposure to ultra-violet radiation" (*supra* pp. 10-11).

²⁴ Petitioner raises no question as to the sense in which the phrase "building up the body's resistance to infection" was used by the Commission in its findings and order, and it is obvious that it was used in its commonly accepted sense, *i. e.*, building up the body's power or capacity to avert, ward off or prevent infection. It is also clear that this was the sense in which petitioner used the expression in its advertisements. In Comm. Ex. 31 (not printed) it represented that "LIFE LITE offers you a sound investment in 'HEALTH INSURANCE' for your whole family!;" that "The ultimate effect of controlled exposure extends to the whole body system," and that the lamp "builds direct resistance to infection" and increases "the general resistance." In Comm. Ex. 25-A (not printed) petitioner advertised that the "improved tone of the body" resulting from the use of its lamp "constitutes a power to resist the invasion of disease."

petitioner claims, "helps the body to resist * * * infection" (petitioner's brief, pp. 52-54). There is no merit to the contention.

Dr. Moor assigned no such factitious meaning to the phrase "building up resistance" to infection as that claimed by petitioner. He was asked whether petitioner's lamp "would be of any value in the treatment of chronic infections" (R. 166). Having just testified that Life Lite was of very little value in the treatment of various ailments, that its use was contraindicated in others and might actually be harmful in some (R. 164-166), Dr. Moor replied:

* * * if you mean building up resistance to an infection, that is not an accepted action of ultra-violet radiation. [R. 166.]

Reading this testimony in its context, it is clear that Dr. Moor did not mean "treating an infection" when he referred to "building up resistance to an infection," but, on the contrary, intended to draw a distinction between treatment and prevention, and to testify that petitioner's lamp was not only of little therapeutic value in *treating* infection, but was of no value as a means of imparting to the body increased power to *prevent* infection. There can certainly be no misunderstanding of his subsequent testimony on cross-examination that he did not agree, and it had not been proven, that one effect of petitioner's lamp was to build "Increased resistance of the body to infection" (R. 191-192).

Dr. Ayres, the Commission's other expert, testified to the same effect, stating, as previously indicated, that he did not think it was true that a person, "not experiencing any particular skin disorder," who used petitioner's lamp "habitually * * * for a considerable period of time, would be less apt to develop a skin disorder than one who did not subject his skin to such treatment" (R. 146).

The substantiality of the testimony of Dr. Moor and Dr. Ayres is in no degree diminished, nor is the Commission's finding opposed, by the fact that petitioner's lamp possesses the power to kill bacteria located upon the surface of the skin

(*supra* p. 15). The lamp is applied for only very short intervals of time and over comparatively small areas of the body.²⁵ Its bactericidal effect is therefore not continuous, and does not extend to the whole body surface. Killing germs on the surface of a small area of the skin may prevent infection by the germs killed, but it does not lessen the danger of infection from *other* germs, nor does it impart to the *body itself* any increased power to ward off or avert infection.

Stimulation to the Tissues of the Skin

Finding that "Aside from its irritating effect, [petitioner's] lamp affords no stimulation to the tissues of the skin" (R. 92), the Commission ordered petitioner to discontinue representing that its lamp affords any such stimulation in excess of that which "may result from its irritating effect" (R. 97). Asserting that the Commission's experts repeatedly testified that Life Lite had a "stimulating effect upon the skin," petitioner says that the "evidence does not give any support at all to this phase of the Findings and Order" (petitioner's brief, pp. 54-55). Petitioner is correct in stating that the Commission's experts testified that petitioner's lamp had a stimulating effect upon the skin, but they used the word "stimulating" in a narrow sense, as synonymous with "irritating,"²⁶ and their testimony fully supports the Commission's finding and order.

Asked whether petitioner's device would "stimulate the tissues of the skin," Dr. Ayres replied, "It depends on what you mean by 'stimulate.' * * * It might stimulate the formation of new granulation tissues," as, for example, by causing "vigorous peeling" in the case of acne (R. 140), but

I don't think you get any great deal of stimulation
* * *. The effect of producing the redness means
that the blood vessels are dilated, and there might per-

²⁵ See petitioner's directions for using the various models of Life Lite. Comm. Ex. 1 (R. 402) and Comm. Exs. 3-7 (not printed).

²⁶ To stimulate is to excite or arouse the system in general, or any special system or organ, to increased functional activity. To irritate is to bring about a reaction of the tissues by the application of a stimulus. Stedman's Medical Dictionary (14th rev. ed. 1939) ; Dorland, The American Illustrated Medical Dictionary (18th ed. 1938).

haps be some degree of stimulation in that regard, but I don't think that it would have any lasting effect or be of any particular value * * * other than in stimulating new granulation in ulcers, perhaps. [R. 141.] ²⁷

Dr. Moor testified that petitioner's lamp might be useful in treating "chronic ulcers," because "you need stimulation to hasten healing" (R. 171), and the lamp "would change a chronic inflammation into a more acute one, and thereby probably promote healing somewhat" (R. 172). Asked whether petitioner's lamp "would stimulate the tissues in the skin," he replied that it was "likely to be damaging to the human tissues" and therefore "would not be desirable for most open wounds" (R. 171). And he specifically stated that the rays of petitioner's lamp were "markedly irritating" (R. 160), "much more irritating to the skin" than the rays of natural sunlight (R. 163), and that one of the two principal uses of the lamp was "to produce irritation of the skin," a "stimulating effect on the skin" (R. 164).

The Commission's experts thus plainly connected stimulation and irritation, and the clear import of their testimony is that petitioner's lamp stimulates by irritating. Further than this, petitioner not only admits, but emphasizes the fact, that its lamp will produce a redness of the skin akin to sunburn, and it is significant, we think, that none of petitioner's witnesses assigned to its lamp any stimulating quality other than that resulting from its irritating effect. Indeed, one of petitioner's experts, Dr. Leighton, testified that the capacity of the lamp to produce vesiculation, or blistering, was greater than that of a sun lamp (R. 281, 283, 350), and another, Dr. Parks, expressly noted its "irritating" properties, stating that the lamp would irritate "much more effectively" than other "irritating substances" (R. 386).

²⁷ Granulation tissue is new connective tissue formed in the process of healing ulcers and wounds and ultimately forming a scar. See definition of "tissue" in Dorland, *The American Illustrated Medical Dictionary* (18th ed. 1938). The expression "stimulating new granulation," as used in the testimony quoted, simply means promoting the growth of new tissue by irritating old tissue.

Normalizing Body Chemistry, Improving Metabolism and Building New Tissues

The final specific provision of the Commission's order to which petitioner objects is that prohibiting petitioner from representing that its lamp

normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as its use may result in the production of vitamin D. [R. 97.]

Petitioner does not contend that the finding²⁸ upon which the Commission based this provision of its order is not supported by evidence. The finding will therefore be presumed to be so supported,²⁹ and there is no necessity to discuss the evidence on which it is based.³⁰ Petitioner's objection to the order is that its meaning is uncertain (petitioner's brief, pp. 55-58).

Conceding it to be "likely that the Commission did not have any such intention," petitioner nevertheless contends that the clause "except insofar as its use may result in the production of vitamin D," applies "only to the normalizing of the chemistry of the body," rather than "to all three of the biological effects enumerated in the wording preceding" the clause, and the order therefore allows petitioner "to advertise only that its lamp would cause production of vitamin D, and nothing more" (petitioner's brief, p. 57). Accordingly, petitioner says, the order should be amended to prohibit it from representing that its lamp "normalizes the chemistry of the body, improves metabolism, or builds new tissues, except insofar as such effects are related to the production of vitamin D resulting from the use of the lamp" (*id.*, p. 58).

It seems to us that petitioner is quibbling, and we disagree with both its reasoning and its conclusion. But there is no

²⁸ R. 92. The finding is quoted in full at page 56 of petitioner's brief.

²⁹ *Federal Trade Commission v. A. McLean & Son*, 84 F. 2d 910, 911 (C. C. A. 7th, 1936), cert. denied 299 U. S. 590 (1936); *Federal Trade Commission v. Inecto, Inc.*, 70 F. 2d 370 (C. C. A. 2nd, 1934); *National Harness Manufacturers' Assn. v. Federal Trade Commission*, 261 F. 170, 171 (C. C. A. 6th, 1919).

³⁰ Supporting testimony appears at R. 172-175, 182-183, 190-191, 202, 253-254, 257.

necessity to debate the point. The only question is what the order means, and that, we submit, is clear. The excepting clause applies to each of the three biological effects referred to in the order, and its plain meaning is almost exactly what petitioner claims its meaning should be. The order does not restrict petitioner to advertising "only that its lamp would cause production of vitamin D, and nothing more," but permits petitioner to represent that insofar as use of the lamp may result in the production of vitamin D, to that extent the lamp not only normalizes the chemistry of the body, but also improves metabolism and builds new tissues. That is substantially all petitioner claims it has a right to say, and there is nothing in the order which requires clarification.

The only difference in the meaning of the order as entered, and as petitioner thinks it should be modified, is that petitioner treats the production of vitamin D as a certainty, whereas the Commission deals with it as a possibility. The evidence fully warrants the Commission's action, for vitamin D is not produced by petitioner's lamp itself; the vitamin is manufactured in the skin from the sterols of the skin, which are activated by exposure to the rays of the lamp (R. 172, 186, 346, 348). If the necessary sterols are absent from the skin, or are present in insufficient quantities, it follows that no amount of exposure to petitioner's lamp could result in the production of vitamin D, and there is no evidence that such sterols are either present, or present in significant quantities, in the skin of every individual. Petitioner's president himself testified in respect to the production of erythema that "the skin of different individuals varies so greatly that no two react [to petitioner's lamp] exactly the same" (R. 110, 122), and Dr. Truesdail, one of petitioner's experts, remarked in connection with his experiments on treating rickets in rats by using petitioner's lamp to activate the production of vitamin D, "The degree of the healing is not always identical in all animals" (R. 226).³¹

³¹ See also R. 147-148, 151-154, 166. It may also be noted that in its directions for the use of its lamp petitioner itself seems to recognize that varying reactions may be expected from different individuals, stating, "Blonds and brunettes react differently to the ultra-violet. A brunette will usually require longer exposures while the fair-skinned blonde generally reacts readily. Age must also be considered; the very old and the very young demanding greater caution." Comm. Ex. 1 (R. 402).

Paragraph 3 of the Order

All of the provisions of the Commission's order heretofore discussed appear in paragraph 1 of the order. We think that they should be affirmed as entered; but should the Court hold otherwise, no modification of paragraph 3 is required.³² By its very terms paragraph 3 is limited, so far as here pertinent, to enjoining only those representations "prohibited in paragraph 1" (R. 98). Any changes made in paragraph 1 will therefore necessarily, and without further action on the part of the Court, be reflected in paragraph 3, restricting its scope accordingly.

IV

CONCLUSION

It is submitted that the Commission's findings as to the facts are supported by substantial evidence and that its order to cease and desist was properly entered. The Commission therefore prays that petitioner's petition to review be dismissed and that, pursuant to the statute,³³ the Court enter its decree affirming the Commission's order and commanding petitioner to obey the same and comply therewith.

Respectfully submitted,

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WASHINGTON, D. C., January 1944.

³² Petitioner does not object to paragraph 2 of the order (R. 97-98), stating that it "is content to comply with this part of the Order, and raises no issue concerning it" (petitioner's brief, footnote 1, p. 4).

³³ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c), 52 Stat. 113; 15 U. S. C. A. § 45 (c).

United States
Circuit Court of Appeals
For the Ninth Circuit.

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JAN 28 1943

PAUL P. O'BRIEN,
CLERK

No. 10317

United States
Circuit Court of Appeals
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MINORU YASUI,

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In the District Court of the United States for the
District of Oregon

March Term, 1942

Be It Remembered, That on the 22nd day of
April, 1942, there was duly filed in the District
Court of the United States for the District of Ore-
gon, an Indictment, in words and figures as follows,
to-wit: [1*]

In the District Court of the United States
for the District of Oregon

No. 16056

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINORU YASUI,

Defendant.

INDICTMENT FOR VIOLATION OF PUBLIC
PROCLAMATION No. 3 OF THE WEST-
ERN DEFENSE COMMAND AND PUBLIC
LAW No. 503, 77th CONGRESS, AP-
PROVED MARCH 21, 1942.

United States of America,
District of Oregon—ss.

The Grand Jurors of the United States of
America, for the District of Oregon, duly im-

* Page numbering appearing at foot of page of original certified
Transcript of Record.

paneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations, do find, charge, allege, and present:

That Minoru Yasui is a person of Japanese ancestry; that he was born at Hood River, Oregon, on the 19th day of October, 1916.

The Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present that the said Minoru Yasui, in the District of Oregon, and within the jurisdiction of this Court, on or about March 28, 1942, did commit an act in an area designated as a military area by a military commander, to-wit: Lieutenant General John L. DeWitt, the Commanding General of the Western Defense Command, the said Commanding General having been duly and properly appointed, designated, and authorized by the Secretary of War of the United States of America to designate and prescribe the said military area pursuant to and under the authority of the Executive Order of our President, commonly referred to as Executive Order 9066; and the said act committed by the said Minoru Yasui in the said military area was deliberately, wilfully and voluntarily contrary to and in violation of a restriction [2] and regulations known as Public Proclamation No. 3 applicable within the aforesaid military area, which said restriction and regulation was duly prescribed, promulgated, and announced by the said Commanding General of the Western Defense Command, the said Commanding General having been

duly appointed, designated, and authorized to prescribe the said restriction and regulation pursuant to and under the authority of the aforesaid Executive Order; and the act which the said Minoru Yasui did commit in violation of the aforesaid restriction and regulation being:

The said Minoru Yasui, on or about March 28, 1942, between the hours of 8 o'clock P.M. and 12 o'clock Midnight, and on March 29, 1942, between the hours of 12 o'clock A.M. and 6 o'clock A.M., that is to say, between the hours of 8 o'clock P.M. of March 28, 1942, and 6 o'clock A.M. of March 29, 1942, was not within his place of residence at Portland, Oregon; and the said act was contrary to the restriction and regulation set out in said Public Proclamation No. 3, which was duly prescribed, promulgated, and announced, as aforesaid, by said Commanding General of the Western Defense Command, as aforesaid, which said restriction and regulation provided that at all times from and after March 27, 1942, all alien Japanese and all persons of Japanese ancestry should and must, between the hours of 8 o'clock P.M. and 6 o'clock A.M., be within their respective places of residence;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present to the Court that the said Minoru Yasui knew that he was a person of Japanese ancestry, and knew of or should have known of, and understood or should have understood, the restriction and regulation, which pro-

vided that all persons of Japanese ancestry should and must be within their respective places of residence between 8 o'clock P.M. and 6 o'clock A.M., knew of or should have known of the date the said restriction and regulation became effective, and knew or should have known the said restriction and regulation was applicable to him, and, further knew or should have known the said re- [3] striction and regulation was prescribed and promulgated by said military commander, to-wit: the Commanding General of the Western Defense Command; and, further, the said Minoru Yasui knew or should have known that his act, as aforesaid, was in violation of and contrary to the meaning and intent of the said restriction and regulation.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present that the said Minoru Yasui, in committing the above described act, did not act or purport to act pursuant to or within any exception authorized or made to the aforesaid restriction and regulation;

Wherefore, the Grand Jurors aforesaid, upon their oaths aforesaid, do present to the Court that the aforesaid Minoru Yasui, at the time and place, and in the manner and form aforesaid, committed an act contrary to the peace and dignity of the United States and contrary to the welfare, safety, and security of the United States, and contrary to the form of the statute of the United States in such case made and provided.

Dated at Portland, Oregon, this 22nd day of April, 1942.

A True Bill.

ARNOLD S. ROTHWELL,
Foreman, United States
Grand Jury

CARL C. DONAUGH
United States Attorney

[Endorsed]: A True Bill. Arnold S. Rothwell, Foreman. Filed in open Court April 22, 1942. G. H. Marsh, Clerk. [4]

And Afterwards, to wit, on the 4th day of May, 1942, there was duly Filed in said Court, a Stipulation to amend indictment, in words and figures as follows, to wit: [5]

[Title of District Court and Cause.]

STIPULATION

This Matter coming on to be heard on the demurrer of the defendant to the indictment herein, the defendant being present in person and represented by his counsel, Earl Bernard, the United States being represented by Carl C. Donaugh, United States Attorney for the District of Oregon, and Tom C. Clark, Special Assistant to the Attorney General, the Court of its own motion having

noted on Page 2 of the indictment, in Line 11, an apparent defect or imperfection in the matter of form only, in the use of the word "May" in designating the time of the offense and in the use of the word "or" in designating the time of the offense, which defects are plainly imperfections in matter of form only, for the reason that the charging portion of the indictment, on Page 1 thereof, Line 21, plainly and sufficiently designates the date of the alleged offense,

Now Therefore, the parties hereto, being desirous of having further proceedings based on the indictment herein, without more formal proceedings to clarify the apparent defect or imperfection in said indictment in the matter of form only, do hereby stipulate as follows:

The defendant, Minoru Yasui, stipulates and agrees that a reading of the indictment herein completely informs him of all the necessary elements of the charge against him, including the time and place of the alleged offense; that other averments of the indictment make plain to the defendant that the discrepancy hereinabove referred [6] to is a mere defect or imperfection in matter of form only and that he has in no way been prejudiced thereby;

It Is Further Stipulated and Agreed by the defendant and his counsel that in all future proceedings in this criminal action the indictment, by agreement, shall read, on Line 11, Page 2 thereof, as follows: "hours of 8 o'clock P.M. and 12 o'clock midnight, and on March 29, 1942."

Done in open court this 4th day of May, 1942.

MINORU YASUI

Defendant

E. F. BERNARD

Attorney for Defendant

CARL C. DONAUGH

United States Attorney for
the District of Oregon

Approved:

JAMES ALGER FEE

District Judge

[Endorsed]: Filed May 4, 1942. [7]

And afterwards, to wit, on Monday, the 4th day of May, 1942, the same being the 55th Judicial day of the Regular March, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [8]

[Title of Cause.]

May 4, 1942

ORDER TO AMEND INDICTMENT

Public Proclamation No. 3, Western Defense Command, Approved March 21, 1942.

Now at this day comes the plaintiff by Mr. Carl C. Donaugh, United States Attorney, Mr. Thomas C. Clark, Mr. Charles S. Burdell and Mr. Wallace

Howland, Special Assistants to the Attorney General of the United States; and the defendant in his own proper person and by Mr. Earl F. Bernard, of counsel. Whereupon the said defendant is duly arraigned upon the indictment herein, and waives reading of the same, and files herein a demurrer to the said indictment; and counsel for plaintiff and counsel for defendant in open court stipulate and agree that the indictment herein may be amended by substituting the word "and" for the word "or" and the word "March" for the word "May", at the end of line 11 on page 2 of the said indictment herein; and

It Is Ordered that the said indictment may be corrected in accordance with the said stipulation.

Whereupon the said defendant, in open court, withdraws his demurrer to the indictment herein and for plea to the said indictment now says that he is not guilty as charged therein. [9]

And Afterwards, to wit, on Friday, the 12th day of June, 1942, the same being the 88th Judicial day of the Regular March, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [10]

June 12, 1942

WAIVER OF TRIAL BY JURY AND
TRIAL BY COURT

Indictment:

Public Proclamation Issued by Western Defense
Command

Now at this day comes the plaintiff by Mr. Carl C. Donaugh, United States Attorney, Mr. J. Mason Dillard, Assistant United States Attorney, and Mr. Charles S. Burdell, Special Assistant to the Attorney General of the United States, and the defendant, above named, in his own proper person and by Mr. Earl F. Bernard, of counsel. Whereupon said defendant, in open court in person and by his counsel, waives a jury trial in this cause and consents that this cause may be tried by the Court without the intervention of a jury.

Thereupon appear: Gus J. Solomon, B. A. Green, Will Roberts, Randall B. Kester, Omar C. Spencer, Manley B. Strayer, R. R. Morris, Jack McLaughlin and Alfred A. Hampson, attorneys heretofore appointed by the Court as attorneys amicus curiae, and thereupon this cause comes on to be tried by the Court without the intervention of a jury. Thereafter, the Court having heard the evidence adduced, at the close of all of the testimony the said defendant moves the Court for a mandatory verdict of not guilty in this cause. Whereupon this cause is continued for argument until Thursday, June 18, 1942. [11]

And Afterwards, to wit, on Monday, the 16th day of November, 1942, the same being the 13th Judicial day of the Regular November, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [12]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION FOR DIRECTED VERDICT AND VERDICT

This Cause having come on for hearing this 16th day of November, 1942, and the defendant, Minoru Yasui, being present in court in person with his attorney, John Collier, and the United States being represented by Carl C. Donaugh, United States Attorney for the District of Oregon, J. Mason Dillard, Assistant United States Attorney for the District of Oregon, and Charles S. Burdell, Special Assistant to the Attorney General, It Is Hereby Ordered, Adjudged, and Decreed: That the Motion for Directed Verdict heretofore made on behalf of the said defendant is overruled; It Is Further Ordered that the said defendant be remanded to the custody of the United States Marshal pending further proceedings.

Dated at Portland, Oregon, this 16th day of November, 1942.

JAMES ALGER FEE

Judge

[Endorsed]: Filed November 16, 1942. [13]

And Afterwards, to wit, on the 16th day of November, 1942, there was duly Filed in said Court, and entered upon the record, a Finding by the Court, in words and figures as follows, to wit: [14]

In the District Court of the United States
For the District of Oregon

No. C-16056

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MINORU YASUI,
Defendant.

FINDING

This cause by stipulation of the parties having come on for trial by the Court without the intervention of a jury and the Court having heard the evidence adduced, the arguments of counsel, and now being fully advised,

Finds the defendant, Minoru Yasui, guilty as charged in the indictment herein.

November 16, 1942.

JAMES ALGER FEE,
Judge

[Endorsed]: Filed November 16, 1942. [15]

And Afterwards, to wit, on the 17th day of November, 1942, there was duly Filed in said Court, an Opinion, in words and figures as follows, to wit: [16]

[Title of District Court and Cause.]

OPINION

November 16, 1942

James Alger Fee, District Judge:

On December 7, 1941, the armed forces of the Emperor of Japan attacked the bases of the United States in the Islands of the Pacific Ocean without warning and without declaration of war. Congress, on December 8, 1941, by joint resolution, declared a state of war to be existing between the Imperial Government of Japan and the Government and people of the United States.¹

Thereafter, on December 11, 1941, the states of Oregon, Washington, Idaho, Nevada, Utah and Arizona and the Territory of Alaska were designated a theatre of military operations as the Western Defense Command by order of the Secretary of War.

Before the outbreak of hostilities, in August, 1941, Congress had amended a statute² passed in

(1) Public Law 328, 77th Congress, United States Code Cong. Service, No. 9 (1941), p. 843.

1918 designedly to protect "war material" in time of war by placing under protection by punitive provisions "national-defense material", "National-defense premises" and "national-defense utilities", which are therein broadly defined.³

Thereafter, the President of the United States, by Executive Order Number 9066, after reciting that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined" by this statute, authorized and directed the [17] Secretary of War and military commanders designated by him to prescribe military areas in such locations and of such boundaries as might be desired, from which all persons might be excluded and subject to whatever restrictions might be imposed upon the right of persons to enter, remain in or leave, such areas. Lieutenant General John L. DeWitt was designated by the Secretary of War to exercise the authority granted by the Executive Order for the Western Defense Command.

Thereafter, claiming to act pursuant to the

(2) Act of April 20, 1918, 40 Stat. 533, 50 USCA, 101-103.

(3) 50 USCA 104, Act of August 21, 1941, 55 Stat. 655. A previous amendment was Act November 30, 1940, 54 Stat. 1220.

Executive Order and the authority vested in him by the Secretary of War, General DeWitt, by Public Proclamation No. 1, on March 2, 1942, declared certain portions of the Western Defense Command, because of its liability to attack or to attempted invasion and because it was subject to espionage and acts of sabotage, a military area "requiring the adoption of military measures necessary to establish safeguards against such enemy operations."

Certain areas were thereby designated as "Military Areas" and "Military Zones." It was thereby announced that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, and further declared that with regard to other of said areas "certain persons or classes of persons" would be permitted to enter or remain therein under certain regulations and restrictions to be subsequently prescribed. Further "Military Areas" and "Military Zones" are designated by the Proclamation No. 2, of March 16, 1942.

Public Act 503, passed by Congress and approved by the President March 21, 1942, made it a criminal act for any person "to enter, remain in, leave or commit any act in any Military Area or Military Zone established pursuant to the Executive Order of the President by any military commander designated by the Secretary of War", contrary to the restrictions applicable to any such area if such person knew of the existence, application, and extent, of the restriction.

On March 24, 1942, Public Proclamation No. 3 was issued by General DeWitt, reciting "as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones * * *". This regulation established a curfew law for such enemy aliens and such persons of Japanese ancestry within certain of the zones above indicated. [18]

Minoru Yasui, the defendant, is the son of an alien Japanese father and mother. He was indicted April 22, 1942, on the ground that he had violated the curfew provisions of this proclamation. He pleaded "Not Guilty", waived a jury and was tried by the court. The evidence showed that Yasui was born at Hood River, Oregon, on October 19, 1916. On March 28, 1942, at 11:20 P.M., Yasui walked into the police station in Portland, Oregon, within one of the designated areas. He admits this fact and that he knew it was a violation of the regulation. His contention was and is, however, that he could not be convicted therefor because he was a citizen of the United States and that the regulation is, as to him, unconstitutional and void.

It is necessary for the United States in a criminal case, not only to establish the material facts beyond a reasonable doubt, but also to establish that there was an applicable legal basis for the prosecution. This court, established under the Constitution of the United States, must determine jurisdiction at the threshold by pointing to an adequate

and valid law, making punishable the acts done by defendant.

Although in the ultimate there is but one question which the court is called upon to decide and that is the guilt or innocence of Yasui, which can be determined by a single unsupported pronouncement of judgment, the argument herein has taken a wide range and such claims have been made that even at the risk of having the utterances called dicta, as is the current fashion regarding those in the *Milligan*⁴ case, the court should reveal the foundation of the findings. Grave danger exists that otherwise the findings might be used as a basis for unwarrantable action in other times.

The fact that the problem of the Japanese citizen and alien, resident in the states bordering the Pacific, has been solved by the army officers in charge, aided by the acquiescence of the vast majority of the American citizens of that race, does not relieve the court from the responsibility of determining the case as here presented.

The American officer does not desire to found a military dictatorship but to protect his country from the perils of war. Both by training and choice he is first a citizen and second a soldier. Normally, therefore he is [19] an adherent even in times of stress to the Constitution and a representative form of government. General DeWitt is an able and resourceful officer. It is certain he has no inclination, even though faced with a serious

(4) *Ex Parte Milligan*, 71 U.S. 2.

situation, to violate the fundamental law of the country.

As a premise, then, the existence of a war in which victory is a vital necessity to assure survival of the freedom of the individual guaranteed by the Federal Constitution, must be predicated. The conditions and necessities of preparation for modern war had previously been recognized by this court.⁵ The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens,

(5) "In this present period, the wars undeclared under the law of nations, the disregard of international convention, the hostile concentrations cloaked by manifestos of pacific intention, the elimination of time and distance as ponderable factors, the lightning strokes of modern arms are actualities over which the words 'at peace' cannot be permitted to tyrannize in making judgments." *Stone vs. Oscar Christensen*, 36 F. Supp. 739 (D. C. Oregon) (Fee), December 23, 1940. It was there held before declaration of war that the draft act of 1940 was constitutional in order to provide for the national defense.

Ex Parte Owens, unreported, (D. C. Oregon) (McColloch), here it was held that one under eighteen years of age who had enlisted in the National Guard of the State of Oregon without parents' consent could be inducted and compelled to serve after the mobilization in federal service. Affirmed on a different point, *Owens vs. Huntling*, 115 F. (2d), 160.

were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order.

It must be remembered, however, when dealing with the claims made by writers who are not charged with the responsibility of maintaining the structure of the fundamental law and the guarantees of the liberty of the individual, that the perils which now encompass the nation, however imminent and immediate, are not more dreadful than those which surrounded the people who fought the Revolution and at whose demand shortly thereafter, the ten amendments containing the very guarantees now in issue were written into the Federal Constitution;⁶ nor those perils which threatened the country in the [20] War of 1812, when its soil was in the hands of the invader and the Capitol itself was violated; nor those perils which engulfed the belligerents in the war between the States, when each was faced with disaffection and disloyalty in the territory in its control. Yet each maintained the liberty of the individual.

In *Ex Parte Milligan*, *supra*, a citizen of the United States who had been tried, convicted and sentenced to death by military commission for con-

(6) "The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war." Chafee, *Free Speech in the United States* (1941) 30.

spiracy and subversive measures against the federal government, applied for habeas corpus. He had at all times been a resident of the local state of Indiana, which was not at the time under occupation by any hostile troops, although it had been previously invaded and was then threatened with invasion.

When this case came before the Supreme Court of the United States, the whole field of the interrelation of the civil and military power was covered in the arguments of able counsel. The court in the opinion of necessity considered thoroughly and intentionally the foundation of military power over civilians. It was necessary there, as here, to determine whether a citizen, who is not a soldier, a prisoner of war, nor a spy in a loyal state not presently invaded, is subject to military jurisdiction, or whether as a non-belligerent he must be tried by civil courts solely for offenses designated by Congress. The direct question in this case was not there involved, because trial by a military commission is not here attempted. But the opinion in all its phases is binding upon this court. It cannot be disregarded. The expressions cannot be brushed aside as dicta, except by a process of wishful rationalization.

The rationale of both the main and concurring opinion is that the civil power in this country is supreme. Neither directly nor indirectly can the military power become dominant. The Constitution, laws and treaties of the United States control.

Nor is the situation changed by the incidence of war. This doctrine has been re-affirmed many times by the Supreme Court of the United States,⁷ citing the Milligan case. [21]

But it is urged without making a distinction between power based upon military necessity and power based upon Congressional action that in time of war the constitutional guarantees must be re-interpreted. If this be a plea for the exercise of arbitrary power, it is not conceived that it has the support of the military authorities, and, certainly, has not the support of the decided cases. The argument proceeds upon the basis that the disposition of the Supreme Court now is to overlook the constitutional limitations when confronted with an emergency.

(7) *Sterling vs. Constantin*, 287 U.S. 378; *Home Building & Loan Association vs. Blaisdell*, 290 U.S. 398, 426.

“We must therefore first inquire whether any of the acts charges is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan*, *supra*.”

Ex parte Quirin, Supreme Court of the United States, October 29, 1942, p. 9.

It is true that the modern tendency is to refuse to draw tight the circle of inviolability about rights of property⁸ under the due process clause and to change the emphasis in relations of labor and capital.⁹ But there is no indication either in peace or war of a disposition to wear away the fundamental guarantees of liberty of the individual. Indeed, the emphasis, if not for extension, by construction at least has been strongly upon increasing vigilance in regard thereto.¹⁰ Here no mere property rights are involved, but the right of personal freedom of action.

The court speaks distinctly in the *Milligan* case regarding the re-interpretation of the guarantees because of the perils of war.

“It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in time of war the commander of an armed force (if in his opinion the exigencies of the

(8) *United States vs. Carolene Prodcets Co.*, 304 U.S. 144; *Home Building & Loan Association vs. Blaisdell*, *supra*, 448; *Block vs. Hirsh*, 256 U.S. 135, 145; *Hamilton vs. Kentucky Distilleries Co.* 251 U.S. 146, 156-7.

(9) *Lauf vs. E. G. Shinner & Co.*, 303 U.S. 323, 325; *National Labor Relations Board vs. Pacific Greyhound Lines, Inc.* 303 U.S. 272; *New Negro Alliance vs. Sanitary Grocery Co.*, 303 U.S. 552.

(10) *Johnson vs. Zerbst*, 304 U.S. 458; *Hague vs. Committee for Industrial Organization*, 307 U.S. 496; *Thornhill vs. Alabama*, 310 U.S. 88.

country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States." [22]

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules."

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure to-

gether; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

The question now before this court is whether a military commander has the right to legislate and pass statutes defining crimes which will be enforced by the civil courts. A power to so legislate validly and to execute such laws makes the possessor thereof supreme. The Constitution vests the legislative power in Congress. It is axiomatic that so long as no form of military jurisdiction is in force over the particular locality or person, the civil law will prevail.

The classical definitions of various situations where ordinary civil law does not apply is given in the concurring opinion in *Ex parte Milligan*, as follows:

"There are under the Constitution three kinds of military jurisdiction; one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of those may be called jurisdiction under Military Law, and is found in acts of Congress prescribing rules and ar-

ticles of war, or otherwise providing for the government of the national forces; the second may be distinguished as Military Government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated Martial Law Proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." [23]

This is not a case here prosecuted under "military law" as above defined. Yasui holds a commission voluntarily accepted as a Second Lieutenant in the Officers Reserve Corps. By this voluntary surrender of his civilian status under certain circumstances Congress could have made him amenable to military law. But if so, he would have been tried by court martial, under an Act of Congress establishing the "Articles of War".¹¹ An appeal to a civil court erected under the Constitution would

(11) 41 Stat. 804.

be improper.¹² Under the Articles of War, the right of the superior officer to legislate or establish rules and regulations for those under his command is clear. Violations of such orders are made punishable. While it is true this court has held that a civilian can be required to give military service involuntarily, at the call of his country and while upon induction into the service he becomes subject to military law, until inducted, the civilian does not owe obedience to army orders or proclamations.

Trial by military commission of spies, prisoners of war and civilians attached to the military forces is another exception to the rule that military law does not apply to civilians. In certain instances in case of spies it is recognized as applicable to civilians under the Articles of War.¹³ Precedents, furthermore, exist in our history for the trial of spies by military commission whether discovered in a

(12) *Smith vs. Shaw*, 12 Johnson 257; *In re Kemp*, 16 Wisconsin, 359; *Ex parte Goldstein*, (D.C.) 268 F. 431; *United States vs. McIntyre*, 9 Cir. 4 F. (2d), 823; See in *re Egan*, 5 Blatch. 319, 8 Fed. Case No. 4303. *Ex parte Henderson*, 11 Fed. Case No. 6349.

(13) The Articles of War seem to give specific legislative authority for trial by "Military Commission" under the situation. See Article 82, 41 Stat. 804, 10 USCA, Sec. 1554. *United States ex rel Wesels vs. McDonald*, 265 F. 754, app. dism. 256 U.S. 705. But see *Op. Atty. Gen.* 356 and see *Arnand vs. United States*, 26 Ct. Cl. 370.

military area or not.¹⁴ These explain the recent action of the Supreme Court of the United States in refusing habeas corpus to persons tried by military commission who had landed surreptitiously on the shores of this country and who were afterward captured in the interior.¹⁵ The fact that those who had some claim to American citizenship were [24] included in the number furnishes no precedent here. An American citizen in service of the enemy who comes through the lines of battle to land here is subject to the laws of war.¹⁶ It is to be noted that citizens residing in this country alleged to have

(14) The most notable was the case of Major Andre, the English confederate of General Arnold in the Revolution, whose sentence to death by military commission was approved by Washington and executed. See Argument of B. F. Butler, in the Milligan case, *supra*, 99-101, where this and other matters are cited. The broader implications contended for seem to have been there repudiated.

(15) *Ex parte Quirin*, *supra*.

(16) The doctrines of *Ex parte Milligan* are not repudiated by the *Quirin* decision. The *Milligan* case gives color to the doctrine that a "prisoner of war" can be tried in loyal territory in time of war by military commission; Page 131.

"We say 'enemy's country' because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be deemed enemies of the United States and of all its people." *Juragua Iron Company, Ltd. vs. United States*, 212 U.S. 297, 305-6.

assisted such persons were not tried by military commission but were indicted for treason.¹⁷

Another exception to ordinary civil rule prevails in war. The military to meet the emergency of the times, where the peril is too great to permit certain persons to go at large, are at times forced by the public danger to seize persons, citizens and alien alike, and to hold them and even to transport them long distances. History shows that in such instances the power of the courts has been defied.¹⁸ The rule of force alone is then applied. In the event that habeas corpus is sought, the question of whether this remedy is apposite must be judged under the Constitution and the civil law. If the person has been seized for an indictable offense and the usual processes have been followed, he can be held. It is only when the exercise of the writ has been illegally suspended in a given area or the courts have been closed that the military can postpone the application of the fundamental doctrines, unless the particular case fall within the exceptions.

Nor is this a situation where a "military government" could be erected. Oregon is not conquered territory nor hostile country. It is an area, the inhabitants of which are intensely loyal to the United States. In few portions of the country is the population as co-operative in the war effort. [25]

(17) The indictment and trial of alleged confederates have been reported in the press.

(18) See *Ex parte Merryman*, 17 Fed. Cas. 144 No. 9487 (C.C.Md).

The application of military government in the states of this country has never been made except after the war between the states, when the area of the southern states was treated as territory conquered from a belligerent, and military governments were set up therein.¹⁹ The history of this experiment suggests that it be not repeated.²⁰

The present case does not then arise under "military law", nor can it be justified by doctrines relating to trial of military personnel by court martial, nor to trial of spies by military authority. The instant case relates to the power of the military

(19) Birkhimer, *Military Government and Martial Law*, (2d Ed.), Chapter XXIII.

(20) President Wilson, in the dark days of another war, when the peril of sabotage and espionage was as great, and the number of citizens of divided loyalty at least as great, expressed strong opposition to the enactment of a statute which would have divided this country into military districts subject to regulations adopted by appropriate military commanders. He wrote to Senator Overman, as follows:

" * * * I am heartily obliged to you for consulting me about the Court-Martial Bill, as perhaps I may call it for short. I am wholly and unalterably opposed to such legislation * * * . I think it is not only unconstitutional, but that in character it would put us nearly upon the level of the very people we are fighting * * * . It would be altogether inconsistent with the spirit and practice of America * * * , I think it is unnecessary and uncalled for. * * * " 8 Baker, *Woodrow Wilson, Life & Letters*, 100; *Chafee Free Speech in the United States*, supra, 38, Note 18.

commander to issue regulations binding indiscriminately upon citizens and alien, reserve officer, spy and civilian. Such power only is tolerated in the first instance if a state of "martial law" has been proclaimed by the proper authority and in the ultimate only if the facts prove the existence of the military necessity therefor.

"But when the military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. Those laws may be made actually operative; obedience to them may be enforced by military power; their purpose and effect may be solely to support or recruit his armies, or to weaken the power of the enemy with whom he is contending. But he is a legislator still; and whether his edicts are clothed in the form of proclamations, or of military order, by whatever names they may be called, they are laws. If he have the legislative power conferred on him by the people, it is well. If not, he usurps it. * * * He is not the military commander of the citizens of the United States, but of its soldiers." [26]

"The military power over citizens and their property is a power to act, not a power to prescribe rules for future action. It springs from present pressing emergencies, and is limited by them. It cannot assume the functions of the statesman or legislator, and make provisions

for future or distant arrangements by which persons and property may be made subservient to military uses. It is the physical power of an army in the field, and may control whatever is so near as to be actually reached by that force in order to remove obstructions to its exercise.”²¹

A military commander under the Constitution is given no power of legislation. It follows, therefore, in this case, that the regulations issued by his sole authority, even though it be established that the territory on the Pacific Coast of the United States has been invaded and is in imminent danger of invasion, confer upon the military commander no power to regulate the life and conduct of the ordinary citizen,²² nor make that a crime which was not made a crime by any act of Congress. The Congress of the United States is in session and consists of the elective representatives of the people. To this body, therefore, alone is committed its ordinary power of passing laws which govern the conduct of citizens, even in time of war.

(21) Davis “Executive Power” (October 1862), quoted in Birkhimer’s *Military Government and Martial Law*, (2d Ed.), Section 368.

(22) “ * * * the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.” *Ex parte Quirin*, *supra*, 21.

It is true that martial law, when instituted, is complete and represents the arbitrary will of the commander,²³ controlled only by consideration of strategy, tactics and policy and subject only to the orders of the President. Under martial law the commander can seize men and hold them in confinement without trial. He can try them before a military commission for a violation of the laws of war or his own regulations. Finally, he can [27] legislate and bind citizens and others by rules established by him and governing their conduct in the future.²⁴

Whether declared by the President or by Congress or by the military commander or existing on

(23) See arguments in the Milligan case. It is true as heretofore pointed out, the exercise of will is restrained in the American officer by a sense of ultimate civil responsibility. See Birkhimer, *Military Government and Martial Law*, (2d Ed.), Chapter XIX, which contains an exposition of this attitude. Public opinion in the governed territory is perhaps a restraining force in certain fields, but is not presently a factor here.

(24) Under the Organic Act of Hawaii, the Governor, on December 7, 1941, turned the control over to the military the courts closed to re-open under military direction for certain purposes only and the territory is now completely governed by the military. The necessity there is apparent, but the consequences support the statements above.

Proclamation of defense period, Joseph B. Poindexter, Governor, December 7, 1941.

Proclamation of martial lay, Joseph B. Poindexter, Governor, December 7, 1941, Honolulu Star-Bulletin, Dec. 8, 1941.

Proclamation of acceptance of military rule, Lieu-

account of conditions, the only basis for martial law is military necessity.²⁵

tenant General Short, December 7, 1941, Honolulu Star-Bulletin, Dec. 8, 1941.

General Orders No. 4, December 7, 1941, Honolulu Star-Bulletin, Dec. 9, 1941.

General Orders No. 29, December 16, 1941, Honolulu Star-Bulletin, Dec. 19, 1941.

General Orders No. 57, January 27, 1942, Honolulu Star-Bulletin, Jan. 30, 1942.

(25) Letter President Lincoln to Secretary Chase, September 2, 1863:

“Knowing your great anxiety that the Emancipation Proclamation shall now be applied to certain parts of Virginia and Louisiana which were exempted from it last January, I state briefly what appear to me to be difficulties in the way of such a step. The original proclamation has no constitutional or legal justification except as a military measure. The exemptions were made because the military necessity did not apply to the exempted localities. Nor does that necessity apply to them now any more than it did then. If I take the step, must I not do so without the argument of military necessity, and so without any argument except the one that I think the measure politically expedient and morally right? Would I thus not give up all footing upon Constitution or law? Would I not thus be in the boundless field of absolutism? Could this pass unnoticed or unresisted? Could it fail to be perceived that without any further stretch I might do the same in Delaware, Maryland, Kentucky, Missouri, and Tennessee, and even change any law in any state? Would not many of our own friends shrink away appalled? Would it not lose us the elections, and with them the very cause we seek to advance?”

There is a pernicious doctrine known as "partial martial law", which was developed by an ambitious governor as a method of dictating regulations to the people of a state uncontrolled by the Constitution or laws thereof.²⁶ It constituted an expression of his arbitrary will. The long history within recent years of the use of arbitrary power in the guise of martial [28] law by the executives of the states, sometimes upon the flimsiest pretext,²⁷ and occasionally, with the unjustifiable support of the judiciary state²⁸ and federal, in subversion of the rights and personal liberty of the citizen, indicates that a fear that the state officials might in some future time attempt further violations is at least justifiable.

These perversions of martial rule used by governors of the states in industrial and social conflict

(26) Governor Allen of Louisiana acting under express directions of Senator Huey Long, N. Y. Times, Aug. 6, 1934, p. 2, col. 6. See *Commonwealth ex rel. Wadsworth vs. Shortell*, 206 Pennsylvania, 165, 170-1.

(27) See *Miller vs. Ribers*, 31 F. Supp. 540; *Patten vs. Miller*, 190 Georgia, 165; *Hearon vs. Calus*, 178 South Carolina, 381; *Allen vs. Oklahoma City*, 175 Oklahoma, 421; *United States vs. Phillips*, 33 F. Supp. 261.

(28) *State ex rel. Mays vs. Brown*, 71 West Virginia, 519; *Ex parte Jones*, 71 West Virginia, 567.

(29) *United States ex rel. Palmer vs. Adams*, 26 F. (2d) 141, 144; *Bishop vs. Vandercook*, 228 Michigan 299, 309.

[Printer's Note: Footnote 29 not indicated on copy.]

to satisfy a personal need for uncontrolled power in given situations, wherein the civil rights of individuals were swept away by legislation or fiat dictated by an individual, indicate that in these trying days of war, limits must be set to military authority exercised in the name of necessity, lest we lose the liberties for which we fight.

“But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.” *Ex parte Milligan, supra*, 126.

The doctrine that there can be a partial martial law, unproclaimed and unregulated except by the rule of the military commander, expressed in orders or regulations proclaimed by him and enforced in the civil courts in a territory within the continental limits of the United States and at the time not occupied by any foreign foe, belongs in the category of such perversions, and cannot be justified by any sound theory of civil, constitutional or military law. Its only justification lies in the doctrines of “state of siege” proclaimed by military commanders, generally speaking, in the governments of Europe. For a state of the United States or any portion thereof to be placed, in any essential function, or for citizens of the United States to be placed with regard to their fundamental rights, subject to the will of the commander alone, how-

ever well designed for their protection, [29] without any of the preliminaries above suggested,³⁰ up to the time when utter necessity requires the abolition of all civil rule for the preservation of the government, would seem to be a complete surrender of the guarantees of individual liberties confirmed in the Constitution of the United States.

The confusion in the authorities seems to arise in a failure to differentiate between a case where martial law is properly declared in civil disturbances³¹ and a case where the military is called upon to aid the civil power. In the latter case no special attributes³² should be ascribed either to the soldier or the commander. Ordinary civil law is enforced by a greater power.

“Thus the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is the power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.”

(30) See *Manley vs. State*, 62 Texas Cr. 392, *Manley vs. State*, 69 Texas Cr., 502.

(31) See *Moyer vs. Peabody*, 212 U.S. 78.

(32) *Constantin vs. Smith*, 57 F. (2d), 227, 238, 241; *Bishop vs. Vandercook*, *supra*; *Franks vs. Smith*, 142 Kentucky 232; *Fluke vs. Canton*, 31 Oklahoma, 718; *Manley vs. State*, *supra*, 400.

Home Building and Loan Assn. vs. Blaisdell, *supra*, 426.

The replacement of the statutes of Congress, the courts and civil authority in this area can then be effected only by "martial law proper", under the definitions given. What then is the test? The court in the Milligan case says:

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; * * *. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'" *Ex parte Milligan, supra*, 127. [30]

The concurring opinion did not controvert this holding. The concurring judges gave support to this doctrine, but held that Congress if the necessity were legislatively found, could declare martial law, as could the President under given circumstances.

It was vital to find whether "martial law proper" prevailed in Indiana for the determination of the case. If it prevailed, whether declared by Congress or the President, or in existence because of military necessity, a citizen could have been tried by military commission, although he was neither prisoner of war, spy, a resident of enemy country nor attached to the military forces. Otherwise, he could not. The recital by the court of the facts shows that the peril was extreme,³³ but held that martial law was not in effect.

No designation need be given to acts which the military sometimes are required to commit under the stress of war and of military necessity, such as the arrest and ejection of a federal judge from his lines by Andrew Jackson,³⁴ the refusal of General Cadwalader under Lincoln's order to obey the writ of the federal circuit court,³⁵ the seizure of Vallan-

(33) Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government and have not the excuse even of prejudice of section to plead in their favor, is wicked; but resistance becomes an enormous crime, when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture are extremely perilous; and those concerned in them are dangerous enemies of this country * * * ". *Ex parte Milligan*, *supra*, 130.

(34) See *Ex parte Milligan*, *supra*, 52.

(35) *Ex parte Merryman*, *supra*.

digham,³⁶ of Milligan.³⁷ The fact that a conscientious commander commits such acts at times to perform his mission does not always render them lawful. The power to suspend the writ of habeas corpus is given, so that a civil court cannot pass on legality of such acts in time of public danger. The rule of the commander is the rule of force. He may have the physical power to seize, to hold, to confine the individual and to disobey the orders of the court. It may be his military duty. Whether he has made himself civilly responsible for illegal acts can only be tried after the event, when the rule of force has ended. But such acts, however necessary, establish no doctrine of qualified martial law and are, in instances, unjustified by law. [31]

But it is too clear for debate that martial law does not come into existence under constitutional government until utter necessity compels the investment of one man with the power of life and death over citizen and soldier alike in a given area.³⁸ It is the law of self-defense among nations.

(36) *Ex parte Vellandigham*, 28 Fed. Cas. 814, No. 16,816.

(37) *Ex parte Milligan*, *supra*.

(38) In Hawaii at the present time, pursuant to a proclamation of martial law, military commissions for violations of the laws of the United States or the Territory or the "rules, regulations, orders or policies of the military authorities" adjudge punishment commensurate with the offense committed and "may adjudge the death penalty in appropriate cases". General Order No. 4, Honolulu Star-Bulletin, Dec. 9, 1941.

Like self-defense, it is a use of elemental force sanctioned by common law, initiated solely by stark necessity and vanishing when the necessity no longer exists.³⁹ If military necessity does not exist, neither the declaration of war nor the proclamation of martial law can justify acts contrary to ordinary law.⁴⁰ On the other hand, where there is no declaration of martial law by Congress or the President or by the General in this area, and when there has not even been a suspension of the writ of habeas corpus, there is a strong implication that in the judgment of the political authorities no necessity justifying such action exists.

While a war is in progress, the question of whether military necessity requires the closing of the courts and the abrogation of civil authority for the time being and in a certain area, is one for the political or executive departments of the government. There should be a clear line of demarcation drawn by the political agencies between government by fiat, and by law.

The existence of military necessity is justifiable under a particular set of circumstances. In the event the military commander has taken measures under the guise of martial law when the military necessities did not actually require, he has been held civilly liable after the war is finished.⁴¹ [32] But it is

(39) *Ex parte Milligan*, *supra*.

(40) *Sterling vs. Constantin*, *supra*.

(41) The bright star in the crown of Andrew Jackson was the fact that although justly flushed

obrious during the clash of arms the evidence of military necessities cannot be adduced in a civil court. Therefore, such a tribunal should not be called at that time to declare whether the necessity exists.⁴² When the Congress in session has not declared martial law and the President has not recognized the existence of martial law by executive order closing the courts and even the military commander has not proclaimed martial law is in effect, a court cannot take the responsibility in view of the clear declaration of the Supreme Court of the United States that a martial law is not in effect unless the courts are closed. While it is true that

with triumph at New Orleans, he paid a fine in the federal court, because he had arrested the judge thereof upon the ground that the latter was interfering with the military security of his force. Actually, at the time of the ejection, peace had been proclaimed and, therefore, the military necessity did not exist. Jackson apparently recognized that he had no legal right to act on appearances where the fact did not justify action. He was brought into court on a charge of contempt before the same judge, who fined him. Jackson paid the fine. The apologists cite the fact, that Congress subsequently made Jackson whole for this expenditure in the last year of his life and after he had been twice President of the United States, as an argument for the existence of the power to act without sanction of actual necessity. See *Arguments Ex parte Milligan*, *supra*, 52, 94-7.

(42) See *Consolidated Coal & Coke Co. vs. Beale*, 282 F. 934 (D.C.) where it is said that a court cannot make a determination in advance that troops are necessary to quell an insurrection.

neither a declaration of the President,⁴³ nor of Congress,⁴⁴ nor of the military commander [41] would be binding upon a court eventually, if the necessity did not exist, until some political or military authority has faith enough in the position to proclaim a state of martial law, a court which is in fact open, should not find the existence of necessity as a fact.

All this points to the vital inconsistency here developed between the action taken by the civil authorities in a federal court bound by and acting under the guarantees of the Constitution of the United States and its amendments, and the claim that a military necessity has arisen so vital that its exigencies demand that citizens of the United States be confined to their places of lodging at hours dictated by a military commander. If such an emergency exists, and it may well be that it does, the Congress of the United States or the Executive, in the months since Pearl Harbor, could [33] have declared martial law or at least suspended the writ of habeas corpus in view of the situation. If the emergency exist, the military commander may be justified in seizing the body of Yasui and removing him from the military areas or zones. Of a certainty, if the military commander can allow a civil court to remain open to try violations of his orders, without support by force, military necessity cannot be so imperative that the fundamental safeguards must be abandoned. So long as the courts of the

(43) See *Sterling vs. Constantin*, *supra*.

(44) See *Ex parte Milligan*, *supra*.

United States are open, these tribunals are bound by Constitution and treaties of the United States and legislation of Congress. The proclamations or regulations of a military commander cannot be enforced by such tribunals.⁴⁵

But it is contended that there was an adoption of the proclamations of the military commander because the act of Congress passed three days earlier prescribed penalties for acts done in violation of the regulations issued with reference to certain areas or zones. Congress itself could not make constitutionally a distinction relating to the conduct of citizens based on their color race.⁴⁶ Such an intention is not to be found inadvertently.⁴⁷ Congress itself could not in loyal territory uninvaded make

(45) Marshall, C. J., says in considering a motion for a writ of habeas corpus in *Ex parte Bollman*, 8 U.S. 74, 93, where petitioner was charged with treason, "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution, or by the laws of the United States. * * * Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

(46) See *Retirement Board vs. Alton R. Co.*, 295 U.S. 330; opinion of the present Chief Justice, *Hague vs. Committee for Industrial Organization*, *supra*, 519. See also *Yick Wo vs. Hopkins*, 118 U.S. 369; *Buchanan vs. Warley*, 243 U.S. 60.

(47) "The issue is fraught also with great international significance in terms of our relations with colored peoples generally." McWilliams, "Moving the West-Coast Japanese", *Harper's Magazine*, September, 1942, Vol. 185, No. 1108, pages 359, 369.

acts of citizens criminal simply because such acts were in violation of orders to be issued in the future by a military commander.⁴⁸ Congress could have declared martial law [34] and thereupon the courts might have become adjuncts or agencies of the General commanding. Under these circumstances he might have had the power to legislate by regulation and create classes of citizens.

There are valid reasons for control of citizens of Japanese ancestry, but the test is color and race. An equally valid foundation can be found for control of persons of Italian, German⁴⁹ and Irish ancestry. A real basis in necessity might be found in the imposition of such regulations upon the eastern frontier after the landing of persons of German ancestry who were harbored in this country. But the history of this country contains too many examples of loyalty of persons of foreign extraction to justify any blanket treatment. The precedent, if valid, can be made to justify exile or detention of any citizen whom a military commander desires in a loyal state not under threat. If the military necessity existed and martial law was actually in effect, justification might be pleaded.

There are suggestions that control by curfew or

(48) *Schechter Poultry Corporation vs. United States*, 295 U.S. 495.

(49) The literature of the last World War contains abundant proof.

(50) See Act April 16, 1918 C. 55; 40 Stat. 531; 50 USCA, Sec. 21.

[Printer's Note: Footnote 50 not indicated on copy.]

detention or exile of civilians as to a given area interferes with a lower order of rights than the right to life. Such doctrine sounds strange in this country, with schoolbook memories of Jefferson's doctrine of revolution and Patrick Henry's preference for death.

This court, while not operating as an adjunct of a military commander, must apply ordinary law and protect the rights of a citizen in a criminal case. If Congress attempted to classify citizens based upon color or race and to apply criminal penalties for a violation of regulations, founded upon that distinction, the action is insofar void.

The power of Congress, however, during time of war over aliens of a country which is hostile to the United States is almost plenary, as is that of the President by a series of acts dating to the foundation of the Union.⁵¹ While in ordinary times such persons are entitled to the "equal protection of [35] the laws", when their country is at war with the United States, Congress or the President may intern, take into custody, restrain and control all enemy aliens within the territorial limits of the United States,⁵² and neither are restrained by any

(51) Act July 6, 1798 c.66 Secs. 1, 2, 3, 1 Stat. 577 R.S. Secs. 4068-4070. 50 USCA, Secs. 21-24.

(52) In 1813 upon petition for habeas corpus, the executive order requiring enemy aliens who were within 40 miles of tidewater to retire beyond that limit was upheld. *Lockington's Case*, Brightly, N. P. (Pa.) 269; *Lockington vs. Smith* (C.C. Mich.) 1848, 1 Pet. C.C. 466, Fed. Case. 8448; 50 USCA, Sec 21, p. 11.

constitutional guarantees from such action.⁵³ While the orders of General DeWitt, therefore, were void as respects citizens, unquestionably from the history of the proclamations, Congress would be well on notice that the General might intend to establish regulations relating to enemy aliens within the areas designated by the previous proclamations. The regulations, which make these acts crimes, by adoption thereof by act of Congress are thus valid with respect to aliens.

The only question now for the court to determine is as to whether Yasui, the defendant, is a citizen or an enemy alien.

Under the Constitution of the United States, Yasui, by virtue of his birth in the territorial limits of the United States and notwithstanding the fact that his parents were alien Japanese incapable of naturalization in the United States, had conferred upon him the inestimable right to citizenship in the United States.⁵⁴ By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of election as to whether he would accept citizenship in the United States or give his

(53) *DeLacey vs. United States*, 9 Cir. 249 F. 625; *Minotto vs. Bradley* (D.C. Ill.), 252 F. 600; *Halpern vs. Commanding Officer*, 248 F. 1003. See also *Deutsch-Australische &c. vs. United States*, 59 Ct. Cls, 450. See Proclamation No. 1364, April 6, 1917.

(54) *United States Wong Kim Ark*, 169 U.S. 649.

allegiance to the Emperor⁵⁵ to whom he was bound by race, the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline.

While, therefore, Congress might have set up tests or presumptions whereby the initiation or continuance of the relationship of citizenship in persons who held the dual status during minority might have been tested, as [36] it has done in case of naturalized citizens, or might have permitted segregation until evidence of citizenship were produced, no such intention is apparent in the legislation.

This election is a mental act.⁵⁶ The choice which

(55) Perkins, Secretary of Labor vs. Elg, 307 U.S. 325; Perkins, Secretary of Labor vs. Elg, 99 F. (2d) 408; *In re Arla Marjorie Reid*, 6 F. Supp. 800; *United States vs. Reid*, 73 F. (2d) 153.

(56) "In cases of double allegiance, the child when he becomes of age 'is required to elect between the country of his residence and the country of his alleged technical allegiance. Of this election two incidents are to be observed; when once made it is final, and it requires no formal act, but may be inferred from the conduct of the party from whom the election is required.'" Moore International Law Digest, Volume III, pages 545, 546, Section 430. Mr. Porter, Acting Secretary of State to Mr. Winchester, Minister to Switzerland, September 14, 1885, *Fro. Rel.* 1885, 811.

See *Banning vs. Penrose* (D.C.), 255 F. 159, where considering a case of a person who had become naturalized here and returned to the country of his nativity, "It is a question more of intention than anything else."

exists in the mind of a person is exemplified by acts. The intention, however, to make an election can be discovered by a tribunal as can criminal intent, knowledge or any other mental state. Notwithstanding the expression of some liberal authorities, tender in times of peace to preserve civil rights, such a mental state may be found in a criminal case contrary to the sworn evidence, protestations and declarations of a defendant.

The evidence in this case shows that during the minority of the defendant he made with his parents a trip to Japan when he was about nine years old and remained there during the summer vacation, visiting his grandfather, who was a resident of Japan and a subject of the Japanese Emperor. He attended a Japanese language school in the United States and apparently became proficient in speaking the Japanese language, which he testified was used to considerable extent in his own home. His further education was in the public schools and in the University of Oregon, where he received both an arts and a law degree. During the time that he was taking his arts course at the University, he took the course in military training prescribed and, unquestionably, compulsory. Therefore, upon his graduation with acceptable standards he received a commission as Second Lieutenant in the Officers Reserve Corps, and upon acceptance thereof, took the oath of allegiance to the United States. [37]

Such acts were all during minority and, although they may indicate tendencies, are not evidence of

the election to accept citizenship in the United States or allegiance to the Japanese Emperor. After his majority, he continued in residence in this country, a circumstance which all agree raises an inference that he intended to claim citizenship here. He likewise testified that he voted in the elections, which is another factor inviting attention. It must be remembered, however, that he was still a student in the University of Oregon and received his degree in 1939. Residence for the purpose of education does not ordinarily contain any inference as to intended domicile or citizenship.

The record shows that the father of the defendant was decorated by the Emperor of Japan. Within a few months after Yasui had been admitted to the Bar of the State of Oregon, he was, at the instigation of his father, employed by the Consulate General of Japan at Chicago.

While so employed, Yasui followed the orders of the Consulate General of Japan and made speeches, setting forth the philosophy and purposes of the military caste of Japan as propaganda agent for the Emperor. While in this position, he was registered twice by the Consulate General as a propaganda agent for a foreign power, pursuant to the regulations issued by the State Department of the United States. It is true that he testifies that there was an American citizen named Murphy, presumably not of Japanese extraction, who was employed in the same work, but we are not concerned here with the employment of Murphy or his purposes

or the innocence of his intention. Obviously, he had no election to make. The question before the court is as to what election Yasui made.

Yasui remained as a propaganda agent until after the declaration of war by this country against Japan and after the treacherous attack by the armed forces of Japan upon territory of the United States in the Islands of the Pacific.

The court thus concludes from these evidences that defendant made an election and chose allegiance to the Emperor of Japan, rather than citizenship in the United States at his majority. The court concludes that he served [38] the purpose and philosophy of the ruling caste of Japan as a propaganda agent because he could speak English, and only resigned when it seemed apparent that he could no longer serve the purposes of his sovereign in that office, but could do better execution in the event he could be commissioned an officer in the armed forces of the United States on active service.

Since Congress provided for the punishment of persons violating the proclamations of the commanding officers, and since Yasui is an alien who committed a violation of this act, which included by reference the regulations of the commander referring to aliens, the court finds him guilty.

[Endorsed]: Filed November 17, 1942. [39]

And afterwards, to wit, on Wednesday, the 18th day of November, 1942, the same being the 15th

Judicial day of the Regular November, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [40]

In the District Court of the United States
for the District of Oregon

November 18, 1942

No. C-16056

UNITED STATES OF AMERICA

vs.

MINORU YASUI

SENTENCE

Indictment:

Public Proclamation No. 3 of the Western Defense Command and Public Law No. 503, 77th Congress approved March 21, 1942.

Now at this day comes the plaintiff by Mr. Carl C. Donough, United States Attorney, and Mr. Charles S. Burdell, Special Assistant to the Attorney General, and the defendant, above named, in his own proper person and by Mr. John A. Collier, of counsel; and the Court having heretofore found the said defendant guilty as charged in the indictment herein, and this being the day set for passing of sentence,

It Is Adjged by the Court that the defendant

Minoru Yasui is guilty of the offense of deliberately, wilfully and voluntarily committing an act in an area designated as a military area by a military commander, said defendant being a person of Japanese ancestry.

Whereupon, the said defendant, waiving time for passing sentence, is asked if he has anything to say why sentence should not now be pronounced against him, and no sufficient cause being shown,

It Is Further Adjudged that the said defendant, Minoru Yasui, do pay a fine of Five Thousand Dollars and be imprisoned for a term of One Year and from and after the expiration of said term until said fine be paid; that said defendant be committed to the custody of the Attorney General of the United States or his authorized representative who will designate the place of confinement of said defendant; and that said defendant stand committed until this sentence be performed or until he be otherwise discharged according to law.

Dated this 18th day of November, 1942, at Portland, Oregon.

JAMES ALGER FEE

Judge

[Endorsed]: Filed November 18, 1942. [41]

And Afterwards, to wit, on Tuesday, the 15th day of December, 1942, the same being the 40th Judicial day of the Regular November, 1942, Term of said

Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [42]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE BILL
OF EXCEPTIONS

On application of the defendant, it is

Ordered by the Court that the defendant, appellant in the appeal filed in this case, may have until the 9th day of January, 1943, within which time to procure to be settled and filed with the Clerk of this Court a Bill of Exceptions.

Dated this 15th day of December, 1942.

JAMES ALGER FEE

District Judge

[Endorsed]: Filed December 15, 1942. [43]

And Afterwards, to wit, on the 6th day of December, 1942, there was duly Filed in said Court, a Stipulation designating contents of record on appeal, in words and figures as follows, to wit: [44]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated between the plaintiff and the defendant that the Clerk of the Court shall in-

clude in the record on appeal in this cause, the following documents:

Indictment

Stipulation re Amendment of Indictment

Plea

Record of Trial June 12, 1942

Order Overruling Defendant's Motion for a
Verdict and The Verdict of the Court
Judgment

Order Extending Time for the Signing and
Filing of Bill of Exceptions

Bill of Exceptions

Assignments of Error

This Stipulation.

Dated this 6th day of January, 1943.

CARL C. DONAUGH

United States Attorney

E. F. BERNARD

Attorney for Defendant

[Endorsed]: Filed January 6, 1943. [45]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of
the United States for the District of Oregon, do

hereby certify that the foregoing pages numbered from 1 to 45 inclusive, constitute the transcript of record on appeal from a judgment and sentence of said Court in a criminal cause therein numbered C-16056, in which the United States of America is plaintiff and appellee, and Minoru Yasui is defendant and appellant; that said transcript has been prepared by me in accordance with the stipulation filed by said appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, prepared in accordance with the said stipulation and rules of Court.

I further certify that I am transmitting with said transcript of record on appeal, the original Bill of Exceptions and the original Assignment of Errors filed in said cause by the said appellant.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$21.80 for comparing and certifying the within transcript, making a total of \$26.80 and that the same has been paid by the said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 8th day of January, 1943.

[Seal]

G. H. MARSH

Clerk [46]

In the District Court of the United States
For the District of Oregon

No. C-16056

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MINORU YASUI,
Defendant.

BILL OF EXCEPTIONS

Be It Remembered that on the 12th day of June, 1942, the above entitled cause came on regularly for trial in the District Court of the United States for the District of Oregon before James Alger Fee, Judge presiding, and sitting without a jury at the request and on the stipulation of the parties, the plaintiff appearing by Carl C. Donough, United States Attorney, J. Mason Dillard, Assisant United States Attorney, and Charles S. Burdell, Special Assistant to the Attorney General, and the defendant appearing by E. F. Bernard, his attorney, and Green & Landye (by B. A. Green and Will Roberts), Dey, Hampson & Nelson (by R. R. Morris and Jack M. McLaughlin), Hart, Spencer, McCulloch & Rockwood (by Omar C. Spencer and Manley B. Strayer), and Maguire, Shields, Morrison & Biggs (by Randall Kester), and Gus J. Solomon, all appearing as Amici Curiae.

After the opening statements of the attorneys for

the parties the plaintiff produced and examined as witnesses, William H. Maas, Vincent M. Quinn, Ray Mize, Dewart E. Wagner, Alan Davis, W. G. Everson and Leslie M. Scott. The defendant then testified in his own behalf and the plaintiff produced and examined in rebuttal Gerhard Goetz. No other witnesses were produced or examined nor was any testimony given, save and except by the witnesses herein mentioned, and a transcript of all the testimony given or [47] offered throughout the trial, and of all the proceedings had at the trial, except the ruling of the court on the defendant's motion for a judgment and the exceptions to the ruling taken by the defendant and allowed by the court, is hereunto attached, marked Exhibit "X" and made a part of this Bill of Exceptions.

The testimony of William H. Maas is set forth in full on pages 97 to 99 both inclusive of said Exhibit X; the testimony of Vincent M. Quinn is set forth in full on pages 100 to 108 both inclusive of said Exhibit X; the testimony of Ray Mize is set forth in full on page 107 and on pages 109 to 117 both inclusive of said Exhibit X; the testimony of Dewart E. Wagner is set forth in full on pages 117 to 122 both inclusive of said Exhibit X; the testimony of Alan Davis is set forth in full on pages 124 to 129 both inclusive of said Exhibit X; the testimony of W. G. Everson is set forth in full on pages 129 to 136 both inclusive of said Exhibit X; and the testimony of Leslie M. Scott is set forth in full on pages 136 to 140 both inclusive of said Exhibit

X; and the testimony of the defendant, Minoru Yasui, is set forth in full on pages 148 to 200 both inclusive of said Exhibit X; and the testimony of Gerhard Goetz is set forth in full on pages 201 to 206 both inclusive of said Exhibit X.

The exhibits introduced upon the trial of the case are as follows:

Government's Exhibit 2 which consists of a certified copy of a Foreign Official Status Notification and which, save and except as to the certificate which is not material to any question involved in the case, reads as follows:

"To be prepared in Duplicate
United States of America
Department of State
Foreign Official Status Notification
Division of Protocol June 21, 1941
Dept. of State

Date June 17, 1941

To the Secretary of State:

In accordance with applicable instructions attached hereto, and in connection with the act of June 15, 1917, the act of June 8, 1938, as amended, the act of June 28, 1940, [48] the act of July 1, 1940, and the act of September 16, 1940, I desire to submit the following information for the purpose of regularizing my official status and of claiming any exemption from registration accorded my status under the above-mentioned Acts and regulations promulgated thereunder:

JAPAN

1. Full name Minoru (First name) Yasui (Surname).

YASUI, MINORU

Do not write in this space

2. Name of government and agency or department thereof, if any, being served, Consulate General of Japan, at Chicago, Illinois.

3. Present nationality, American (U. S. citizen).

4. Previous nationality or nationalities, if any,

5. (a) Place of birth, Hood River, Oregon, United States of America.

(b) Date of birth, October 19th, 1916.

6. Port or place, date and manner of last arrival in United States and name of vessel, if any,

7. Status under which last admitted (check one): Immigrant Temporary visitor

Government official or employee. Other (Please describe)

8. Name used at time of last entry, if different from present name,

9. Name and nationality of husband or wife, and address if separate from signer's,

10. Names, ages and nationalities of children, and their addresses if different from signer's,

11. Names and nationalities of other relatives who are members of signer's household,

12. Names and nationalities of personal and domestic employees who are members of signer's household,

13. Capacity in which signer is now serving, giving title of position, if any, Secretary

14. Date of assumption of present duties in the United States, April 1, 1940

15. Detailed statement of signer's present and proposed activities, including the place or places of performance and for whom performed or to be performed, Secretarial Work, and Research: To Be Performed For the Consulate General of Japan, at Chicago, Illinois. [49]

16. Nature and place or places of occupation or employment during the last 5 years,

September, 1933 to June, 1939, student, at University of Oregon, Eugene, Oregon.

June, 1939 to November, 1939, ranch hand, Hood River, Oregon.

November, 1939 to April, 1940, practice of law, Portland, Oregon.

April, 1940 to present date, secretary, Consulate General of Japan, Chicago, Illinois.

17. Business address, or addresses if more than one, 1615 Tribune Tower, Chicago, Illinois.

18. Home address in the United States, or addresses if more than one,

1032 N. Dearborn St., Chicago, Illinois.

704-12th Street, Hood River, Oregon.

19. If declaration to become an American citizen has been filed, state the date and place of application,

20. If visiting in the United States temporarily as a tourist, or for personal business or pleasure,

or if passing in transit through the United States, the following additional information must be furnished:

(a) Whether on private business or for pleasure and if on private business, state the agency, firm, or persons represented,

(b) Temporary address in United States,

(c) Date of proposed departure,

(d) Port or place of proposed departure.

(e) Country to which proceeding,

I will immediately notify the Secretary of State through appropriate channels of any change in my status, activities, or in the other information set forth in this notification.

MINORU YASUI

(Signature)''

A picture of the defendant is attached to said government's Exhibit 2.

Government's Exhibit 3, which consists of a certified copy of a letter dated March 2, 1942, from Henry L. Stimson to Lt. Gen. John L. DeWitt, reads as follows: [50]

“Copy

War Department
Washington

March 2, 1942

Lieutenant General John L. DeWitt,
Commander, Western Defense Command,
San Francisco, California.

Dear General DeWitt:

By letter dated February 20, 1942, I designated you as one of the appropriate Military Commanders to exercise the powers vested in me under Executive Order No. 9066, February 19, 1942, and I delegated to you such powers as are necessary to carry out the purposes of that Executive Order. Incident to the exercise of those powers, you are authorized to employ without regard to Civil Service or Classification laws or regulations, all persons or agencies necessary to carry out your duties. You are also authorized to employ the service of any association, firm, company, or corporation in furtherance of your mission. You will fix the rates of compensation so as to correspond as nearly as possible to the rates prevailing for similar service in the community in which the services are to be rendered.

Under the terms of Executive Order No. 9001, dated December 27, 1941, and subject to the limitations thereof and of the Act of December 18, 1941 (First War Powers Act, 1941, Public Law

354—77th Congress), I am expressly authorized to delegate further the powers therein delegated to me. Pursuant thereto, I delegate to you, within the limits of the amounts appropriated by the Congress, the power to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

In order to remove any doubt as to your authority to obligate funds, I specifically authorize you to obligate funds in such amounts as you deem necessary to effectuate the purposes of the Executive Order, and of your instructions, from any funds in an allotted status available to you, or to incur obligations in excess of such funds, reporting deficiencies to the appropriate chief of supply arm or service.

Sincerely yours,

(S) HENRY L. STIMSON

Secretary of War.

A True Copy:

The letter of February 20, 1942, referred to above, was Secret.

H. B. LEWIS

Colonel, A. G. D. Adjutant General." [51]

Government's Exhibit 4 which consists of a certified copy of Public Proclamation No. 1, Head-

quarters Western Defense Command and Fourth Army, March 2, 1942, and which, save and except as to the certificate which is not material to any question involved in this case, reads as follows:

“Whereas, By virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas, By Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas, The Secretary of War on February 20, 1942, designated the undersigned as

the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas, The Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2. [52]

2. Military Areas Nos. 1 and 2, as particu-

larly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A-1, lying wholly within Military Area No. 1; Zones A-2 to A-99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A-1 to A-99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A-2 to A-99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the zones last above mentioned may be permitted, under certain regulations and restrictions to be hereafter prescribed, to enter upon or remain within Zone B.

The designation of Military Area No. 2 as

such does not contemplate any prohibition or regulation or restriction except with respect to the zones established therein.

5. Any Japanese, German or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamations of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect. [53]

The duty and responsibility of the Federal

Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DeWITT,
Lieutenant General,
U. S. Army,
Commanding."

Exhibit 1 referred to in Government's Exhibit 5 contains a description of Military Area No. 1, and Exhibit 2 referred to in Government's Exhibit 4 is a map showing the territory described and from these Exhibits it is shown that the city of Portland is included in the area classified as "Prohibited Zone 'A-1'".

Government's Exhibit 5 which consists of a certified copy of Public Proclamation No. 3, Headquarters, Western Defense Command and Fourth Army, March 24, 1942, reads as follows:

"To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

Whereas, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

Whereas, By Public Proclamation No. 2, dated March 10, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

Whereas, The present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, and all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned: [54]

1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5,

and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamations Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the

Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

5. By subsequent proclamation or order there will be prescribed those classes of persons who will be entitled to apply for exemptions from exclusion orders hereafter to be issued. Persons granted such exemption will likewise and at the same time also be exempted from the operation of the curfew regulations of this proclamation.

6. After March 31, 1942, no person of Japanese ancestry shall have in his possession or use or operate at any time or place within any of the Military Areas 1 to 6 inclusive, as established and defined in Public Proclamations Nos. 1 and 2, above mentioned any of the following items: [55]

- (a) Firearms.
- (b) Weapons or implements of war or component parts thereof.
- (c) Ammunition.
- (d) Bombs.

- (e) Explosives or the component parts thereof.
- (f) Short-wave radio receiving sets having a frequency of 1,750 kilocycles or greater or of 540 kilocycles or less.
- (g) Radio transmitting sets.
- (h) Signal devices.
- (i) Codes or ciphers.
- (j) Cameras.

Any such person found in possession of any of the above named items in violation of the foregoing will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone."

7. The regulations herein prescribed with reference to the observance of curfew hours by enemy aliens, are substituted for and supersede the regulations of the United States Attorney General heretofore in force in certain limited areas. All curfew exemptions heretofore granted by the United States Attorneys are hereby revoked effective as of 6:00 a. m., PWT, March 27, 1942.

8. The Federal Bureau of Investigation is designated as the agency to enforce the foregoing provisions. It is requested that the civil police within the states affected by this Proc-

lamation assist the Federal Bureau of Investigation by reporting to it the names and addresses of all persons believed to have violated these regulations.

J. L. DeWITT

Lieutenant General,
U. S. Army
Commanding

A True Copy:

H. B. LEWIS

Colonel, A.G.D.

Adjutant General.”

Government’s Exhibit 6 which consists of a certified copy of Public Proclamation No. 5, Headquarters, Western Defense Command and Fourth Army, dated March 30, 1942, and which reads as follows:

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

Whereas, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and [56]

Whereas, by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

Whereas, the present situation within these

Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations, as set forth hereinafter:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described:

Prior to and during the period of exclusion and evacuation of certain persons or classes of persons from prescribed Military Areas and Zones, persons otherwise subject thereto but who come within one or more of the classes specified in (a), (b), (c), (d), (e) and (f), below, may make written application for exemption from such exclusion and evacuation. Application Form WDC-PM 5 has been prepared for that purpose and copies thereof may be procured from any United States Post Office or United States Employment Service office in the Western Defense Command by persons who deem themselves entitled to exemption.

The following classes of persons are hereby authorized to be exempted from exclusion and evacuation upon the furnishing of satisfactory proof as specified in Form WDC-PM 5:

(a) German and Italian aliens seventy or more years of age.

(b) In the case of German and Italian aliens, the parent, wife, husband, child of (or other person who resides in the household and whose support is wholly dependent upon) an officer, enlisted man or commissioned nurse on active duty in the Army of the United States (or any component thereof). U. S. Navy, U. S. Marine Corps, or U. S. Coast Guard.

(c) In the case of German and Italian aliens, the parent, wife, husband, child of (or other person who resides in the household and whose support is wholly dependent upon) an officer, enlisted man or commissioned nurse who on or since December 7, 1941, died in line of duty with the armed services of the United States indicated in the preceding subparagraph.

(d) German and Italian aliens awaiting naturalization who had filed a petition for naturalization and who had paid the filing fee therefor in a court of competent jurisdiction on or before December 7, 1941. [57]

(e) Patients in hospital, or confined elsewhere, and too ill or incapacitated to be removed therefrom without danger to life.

(f) Inmates of orphanages and the totally deaf, dumb or blind.

The applicant for exemption will be required to furnish the kinds of proof specified in Form WDC-PM 5 in support of the application. The certificate of exemption from evacuation will also include exemption from compliance with curfew regulations, subject, however, to such future proclamations or orders in the premises as may from time to time be issued by this headquarters. The person to whom such exemption from evacuation and curfew has been granted shall thereafter be entitled to reside in any portion of any prohibited area, including those areas heretofore declared prohibited by the Attorney General of the United States.

J. L. DeWITT

Lieutenant General,
U. S. Army
Commanding

A True Copy:

H. B. LEWIS

Colonel, A.G.D.

Adjutant General."

Government's Exhibit 7 which is the original birth certificate of Minoru Yasui, the defendant in this case, filed in the Vital Statistics Division of the Oregon State Board of Health, and which reads as follows:

“Oregon State Board of Health
Division of Vital Statistics

CERTIFICATE OF BIRTH

Register No. 159

Place of Birth

County of

of

City of Hood River. (No. Third Street; Ward)

Full Name of Child—Minoru Yasui.

If child is not named, make supplemental report.

Sex of Child—Male.

Twin, 1. Triplet, or other. Number and in order
3 of birth. (To be answered only in event of plural
births.)

Legitimate? Yes.

Date of Birth—Oct. 19, 1916.

Father:

Full Name—Masuo Yasui.

Residence—Hood River, Ore.

Age at Last Birthday—29.

Color or Race—Japanese.

Birthplace—Japan.

Occupation—General Merchant.

Number of children born to this mother, in-
cluding present birth—3.

Mother:

Full Maiden Name—Shidzu Miyake.

Residence—Hood River, Ore.

Age at Last Birthday—27.

Color or Race—Japanese.

Birthplace—Japan.

Occupation—Housewife.

Number of children of this mother, now living, including present birth—3.

Were precautions taken against ophthalmia neonatorum?—Yes. [58]

CERTIFICATE OF ATTENDING PHYSICIAN OR MIDWIFE*

I hereby certify that I attended the birth of this child, who was born alive at 5:30 P. M. on the date above stated.

(Signature)

H. L. DUMBLE, M. D.

Physician

Address

Hood River, Oregon.

Oct. 31, 1916.

J. EDGINGTON,

Registrar.

Given name added from a supplemental report
Nov. 10, 1916.

A. L. McBRIDE

Asst. State Registrar

N.B.—In case of more than one child at birth, a

*When there was no attending physician or midwife, then the father, householder, etc., should make this return. A stillborn child is one that neither breathes nor shows other evidence of life after birth.

Separate Return must be made for each, and the number of each, in order of birth, stated. This certificate must be filed by the attending Physician or Midwife with the Local Registrar within 10 days after birth."

Government's Exhibit 8 which consists of a certified copy of General Orders No. 1, Headquarters, Western Defense Command and Fourth Army, dated December 11, 1941, and which reads as follows:

"General Orders
Number 1

1. The following War Department radiogram, December 11, 1941, is quoted for the information and guidance of all concerned:

"The activation of the Western Defense Command including Alaska, is hereby confirmed. It is designated as a theater of operations. The Fourth Army, Second Air Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as Commander."

2. Pursuant to the authority contained in the radiogram quoted above, the undersigned assumes command of the Western Defense Com-

mand and retains command of the Fourth Army.

J. L. DeWITT

Lieutenant General,
U. S. Army,
Commanding.

(Stamp) (Headquarters Western Defense
Command and Official Copy Fourth Army)

Distribution: "A", "B", "G" & "J".

Ninth Corps Area 1000

Second Air Force 500

Fourth Air Force 500

11th Naval Dist. 10

12th Naval Dist. 10

13th Naval Dist. 10

A True Copy:

H. B. LEWIS

Colonel, A.G.D.

Adjutant General." [59]

Government's Exhibit 9 which consists of a certified copy of a telegram dated December 11, 1941, addressed to Commanding General, Fourth Army, and signed "Marshall", and which reads as follows:

Washington DC

Dec 11, 1941,

621 PM

“Priority

Commanding General

Fourth Army

Pres of SF, Calif

The activation of the Western Defense Command including Alaska, is hereby confirmed. It is designated as a theatre of operations. The Fourth Army, Second Air Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as commander.

MARSHALL

(Stamp) (Headquarters Western Defense Command and Official Copy Fourth Army)

A True Copy:

H. B. LEWIS

Colonel, A.G.D.

Adjutant General.”

Defendant's Exhibit 1 which consists of a registration card with the Department of State for Minoru Yasui, the defendant, and which reads as follows:

“Department of State

Washington

Minoru Yasui

has notified the Secretary of State of his (or

her) status in the United States as an official (or employee) of the Japanese Government.

(Sgd) G. T. SUMMERLIN

GEORGE T. SUMMERLIN,

Chief,

Division of Protocol.

Date June 21, 1941.

The Secretary of State must be notified of any change in the status of the holder of this receipt."

Defendant's Exhibit 10 which consists of a Stipulation entered into between the plaintiff and the defendant and which reads as follows: [60]

"In the District Court of the United States
For the District of Oregon

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINORU YASUI,

Defendant.

STIPULATION

It is hereby stipulated by the parties to the above entitled action that at the trial of the action the following facts are admitted to be true and proof thereof is waived, to-wit:

During and prior to the year 1916 and at the time of the birth of the defendant, Minoru Yasui, the father of the defendant, Masuo

Yasui, and Shidzu Yasui, his wife, the mother of the defendant were residents and inhabitants of Hood River, Oregon; that during all of said time, the defendant's father hereinbefore named was engaged in business in Hood River, Oregon, as a merchant, and that during all of said times, the defendant's mother hereinbefore named was a housewife, and that neither of the defendant's said parents were in the diplomatic service of any country.

CHARLES S. BURDELL

Of attorneys of the
United States of America

E. F. BERNARD

Attorney for the Defendant."

Defendant's Exhibit 11 which consists of a telegram addressed to Minoru Yasui and signed M. Yasui, and which reads as follows:

"Western Union

PRA592 27 NT—K1 Hoodriver Org 7

Minoru Yasui—

306 Dearborn Plaza

1032 North Dearborn St. Chgo—

As war has started your country needs your service as a United States reserve officer I as your father strongly urge you to respond to the call immediately—

M. YASUI."

Defendant's Exhibit 12 which is a letter dated December 8, 1941, addressed to 2nd Lt. Minoru Yasui, and signed E. P. Curtis, and which reads as follows: [61]

“Headquarters Second Military Area
225 U. S. Court House
Portland, Oregon

EPC/f

December 8, 1941

201-Yasui, Minoru

2nd Lt., Inf-Res.

Subject: Extended Active Duty

To: 2nd Lt. Minoru Yasui, Inf-Res.

1032 N. Dearborn Street

Chicago, Illinois

1. Receipt of your telegram of December 8, 1941, is acknowledged. Your tender of service is appreciated and has been made of record at this headquarters.

2. No change in the present War Department policy of ordering officers to active duty to fill existing vacancies has been made. When your name is reached on our priority list for active duty, you will be contacted by this headquarters. In the meantime, it is suggested that you hold yourself in readiness for an early call to active duty.

By command of Major General Benedict:

E. P. CURTIS

Major, A.G.D.

Asst. Adj. Gen.”

Defendant's Exhibit 13 which is a telegram dated December 11, 1941, addressed to 2nd Lt. M. Yasui, and signed E. P. Curtis, Asst. Adj. Gen., and which reads as follows:

“Western Union

CAV335 17 Collect—

Portland, Org 11 443P

2nd Lt M Yasui—

Inf Res 1032 North Dearborn St—

Reurtel effective date or details regarding your active duty not yet determined stop await further instructions—

E. P. CURTIS

Asst. Adj. Gen.”

Defendant's Exhibit 14 which is a letter dated March 28, 1942, addressed to 2nd Lt. Minoru Yasui, and signed W. R. Martin, and which reads as follows: [62]

“Headquarters Second Military Area

225 U. S. Court House

Portland, Oregon

hja/vjm.

March 28, 1942.

201-Yasui, Minoru,

2nd Lt., Inf-Res.

Subject: Status.

To: 2nd Lt. Minoru Yasui, Inf-Res.

704 12th Street,

Hood River, Ore.

The following War Department letter, file

and subject as above, dated March 19, 1942, forwarded by 1st indorsement, Hq. Ninth Corps Area, dated March 23, 1942, is quoted for your information and guidance:

1. Reference is made to your first wrapper indorsement of February 25, 1942, forwarding report of physical examination dated January 19, 1942, of Second Lieutenant Minoru Yasui, Infantry Reserve, (0-360897). The physical defect, defective vision, 8-200 right, is noted.

2. Waiver of the above noted defect is authorized for limited service under the provisions of letter, this office dated January 7, 1942, file AG 210.31 (12-19-41) RP-A, subject: "Waiving of physical defects for limited service officers of the supply arms and services."

3. Lieutenant Yasui will be retained in the Infantry Reserve with eligibility for limited service only.

By command of Major General Benedict:

W. R. MARTIN,
Captain, A.G.D.
Asst. Adj. Gen."

No Exhibits were received in evidence or offered at the trial other than as in this Bill of Exceptions set forth.

During the trial of the case and while the defendant was testifying as a witness in his own behalf the following proceedings were had:

Q. The record introduced by the Government shows that your birth was on October 19, 1916, at Hood River, Oregon. Does that conform with your information that that is the date of your birth? A. It does, sir. [63]

Mr. Bernard: I would like to have this marked for identification, please.

(Stipulation entitled in the above entitled cause, between Charles S. Burdell, of attorneys of the United States of America, and E. F. Bernard, Attorney for the Defendant, was thereupon marked for identification as Defendant's Exhibit 10.)

Mr. Burdell: Oh, I have no objection.

The Court: Admitted.

(Said stipulation, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 10.)

Mr. Bernard: I would like to say, your Honor, this is a stipulation entered into by the Government and myself whereby certain facts are admitted in the case.

The stipulation referred to was then read to the court and thereupon the following proceedings were had:

Mr. Burdell: May it be understood, your Honor, that that stipulation is only for the purpose of this case?

means. Either it is a fact or it isn't a fact. In other words, this Court refuses to try some moot question that is set up by the attorneys for the defense and the Government.

Mr. Burdell: All right, it may be stipulated as a fact, your Honor.

The Court: Stipulation received in evidence.

[64]

At the conclusion of all the evidence in the case and after both parties had rested, the defendant interposed a motion for a directed verdict and for a verdict and judgment of not guilty and the following proceedings were had:

Mr. Bernard: At this time, your Honor, the defendant wishes to interpose a motion for a mandatory verdict or judgment of not guilty

The Court: I don't know exactly what that in this case, on the ground, first, that the indictment fails to state a charge, inasmuch as it is alleged in the indictment that the defendant was born at Hood River, Oregon, in 1916, and there is a presumption from the fact of birth that citizenship follows.

Second, that the evidence is conclusive and without dispute that defendant since his birth, and particularly at the time alleged in the indictment that these acts were committed, had been and is a citizen of the United States, and as such these regulations are void as to him, for the reason that they deprive him of his

liberty and his property without due process of law.

The Court: * * * I would suggest that inasmuch as the question is pretty involved you had better include the other grounds of your motion, and that is that it deprives him of equal protection of the law. That is the other phase of it.

Mr. Bernard: * * * I will add to the motion that, in addition to the ground that the regulations violate the due process of law provisions of the Fifth Amendment, the regulation is discriminatory in that it applies to Japanese-American citizens, or citizens of Japanese ancestry, and to no other citizens, and does not apply [65] to citizens of Italian ancestry or citizens of German ancestry; and that the regulations is discriminatory and deprives the defendant of the equal protection of the laws which he is entitled to enjoy as an American citizen.

After argument of counsel the court took the motion of the defendant under consideration and thereafter, to-wit, on the 16th day of November, 1942, the court rendered its decision and found, as a matter of law, that the regulations which the defendant was charged with violating were void as to citizens of the United States of America and the court made a finding that the defendant was not a citizen of the United States and that the de-

fendant was a citizen of Japan, and the court denied the foregoing motion of the defendant and adjudged the defendant to be guilty.

The defendant duly saved an exception to the finding of the court that the defendant was not a citizen of the United States and was a citizen of Japan, and to the failure of the court to not hold that the defendant was a citizen of the United States, and the exceptions were allowed by the court. The defendant duly saved an exception to the order of the court denying the defendant's foregoing motion for a verdict and judgment and the exception was allowed by the court. The defendant objected and saved an exception to the imposing of any sentence against the defendant and the exception was allowed by the court.

It Is Hereby Certified that the foregoing proceedings were had upon the trial of this cause and that this Bill of Exceptions, which includes a transcript of all the testimony received upon the trial of this cause, which testimony is hereunto attached and marked Exhibit X, contains all the evidence offered or admitted, relative to, or necessary to, an understanding of the foregoing objections and exceptions, together with copies of all exhibits and evidence received or offered upon the trial of this cause and all proceedings had at the trial. [66]

It is further Certified that the foregoing exceptions in each case asked or taken by the defendant were allowed by the court and that this Bill of Exceptions has been presented, settled, and filed

within the time fixed by law and is, by me, duly allowed and signed this 5th day of January, 1943.

JAMES ALGER FEE

One of the Judges of the District Court of the United States for the District of Oregon. [67]

State of Oregon

County of Multnomah—ss.

Due service of the within Bill of Exceptions is hereby accepted in Multnomah County, Oregon, this 15 day of December, 1942, by receiving a copy thereof duly certified as such by E. F. Bernard, of Attorneys for the Defendant.

CARL C. DONAUGH,

Of Attorneys for Defendant.

[Endorsed]: Lodged in Clerk's Office Dec. 15, 1942. G. H. Marsh, Clerk. By R. D. W. Mott, Dep.

[Endorsed]: Filed Jan. 5, 1943. [68]

EXHIBIT X

In the District Court of the United States
for the District of Oregon

C-16056

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MINORU YASUI,
Defendant.

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Portland, Oregon, Friday, June 12, 1942.
10:05 o'clock A.M.

Before: Honorable James Alger Fee, Judge.

Appearances:

Messrs. Carl C. Donough, United States Attorney,
J. Mason Dillard, Assistant United
States Attorney, and Charles S. Burdell,
Special Assistant to the Attorney General,
Attorneys for the United States of America,
Plaintiff;

Mr. Earl F. Bernard, Attorney for Defendant.

Amicus Curiae:

Messrs. Green & Landye (By Mr. B. A.
Green and Mr. Will Roberts);

Messrs. Dey Hampson & Nelson (By
Messrs. R. R. Morris and Jack M.
McLaughlin);

Exhibit X—(Continued)

Messrs. Hart, Spencer, McCulloch & Rockwood (By Messrs. Omar C. Spencer and Manley B. Strayer);

Messrs. Maguire, Shield, Morrison & Biggs [1*] (By Mr. Randall Kester);
Mr. Gus J. Solomon.

Cloyd D. Rauch, Court Reporter.

Proceedings:

The Court: United States of America, plaintiff, versus Minoru Yasui, defendant.

Mr. Bernard: The defendant is ready for trial, your Honor.

Mr. Donaugh: The Government is ready, your Honor.

The Court: The reporter will note the presence of the attorneys whom the Court has asked to appear as friends of the Court in this proceeding on the constitutional questions. Gentlemen, will you introduce yourselves for the purpose of putting your names in the record?

Mr. Solomon: Gus J. Solomon.

Mr. Green: B. A. Green, and also appearing here in court with me is Will Roberts, and it is my intention, your Honor, not to remain during the entire session, but Mr. Roberts will be here during the entire session.

*Page numbering appearing at top of page of original Reporter's Transcript.

Exhibit X—(Continued)

The Court: Yes.

Mr. Kester: Randall B. Kester, for the firm of Maguire, Shields, Morrison & Biggs.

Mr. Strayer: Manley Strayer and Omar C. Spencer, of the firm of Hart, Spencer, McCulloch & Rockwood. [2]

Mr. Morris: Jack McLaughlin and R. R. Morris, of the firm of Dey, Hampson & Nelson.

The Court: Thank you, gentlemen.

You may proceed.

Mr. Donagh: May it please your Honor, I take it from the manner in which this case has been called that the case will be tried by your Honor in the absence of a jury?

The Court: Yes, I understand the record has been made and I think there is a formal waiver of record. Or has there been?

Mr. Bernard: I doubt very much if there has been. My recollection is that it has not, but at this time we will stipulate and request that the case be tried by the Court without a jury.

The Court: And will the defendant make that request personally?

The Defendant: Yes, your Honor.

The Court: The defendant has requested that the case be tried by the Court without a jury, and the Court accedes to the request to try the case without a jury.

Mr. Donagh: Yes, your Honor. I may state briefly to your Honor that this case is a case orig-

Exhibit X—(Continued)

inating by reason of the formal indictment of the Grand Jury for Multnomah County charging the defendant Minoru Yasui with having failed to comply with what is known as Public Proclamation No. 3 issued by the Western Defense Command and Fourth Army, through Lieutenant General J. L. DeWitt, the Commanding Officer of the Western Defense Command and Fourth Army, and what is known as Public [3] Law No. 503, passed by the 77th Congress and approved on March 21, 1942, wherein the Government, by evidence to be presented before your Honor, charges that the defendant, a Japanese, by reason of being a person of Japanese ancestry coming within the purview of the proclamation issued by the Western Defense Command, was absent from his place of residence on and about March 28, 1942, by failing to comply with the orders of the Western Defense Command requiring that all persons of Japanese ancestry be at their places of residence from 8:00 o'clock P.M. up until and including 6:00 o'clock A.M. on the following day.

The facts in this case, as will be presented by witnesses before your Honor, are to the effect that he appeared here in Portland after the 8:00 o'clock hour and was taken into custody by the Portland Police Department, he walking into the Police Station, as I recall the facts, at or about 11:30 or 11:45 P.M., or thereabouts, and was taken into custody by the Portland Police Department under the

Exhibit X—(Continued)

proclamation of the military authorities issued in a military district and establishing the curfew hour.

That, in brief, your Honor, is the nature of the offense charged, and the evidence to be introduced here will be through the testimony of the police officers and the investigation of the case by the agents of the Government.

The Government is also prepared to introduce other testimony concerning the defendant, and if, as and when the opportunity presents under the rules of evidence has the [4] information as to certain beliefs which may be shared by persons of Japanese ancestry, should such evidence be pertinent to the case in hand.

The facts, however, are on the basis of absence from home between the hours of 8:00 o'clock P.M. and 6:00 o'clock A.M.

Mr. Bernard: If your Honor pleases, I know from the fact that your Honor has requested certain attorneys in Portland to appear in this case *amici curiae* that the case must have been considered a little by your Honor already, and for that reason I am not going to make an extended statement.

The evidence in this case will show that Mr. Yasui is an American citizen, and we will introduce evidence to show that that citizenship he has never been divested of, and that at the time of the alleged commission of the acts charged in this indictment he was an American citizen and entitled to all the

Exhibit X—(Continued)

privileges and immunities that attach to that status.

It will be our contention that this proclamation as applied to this defendant, and, indeed, the Executive Order of the President, if that Executive Order ever contemplated granting such power to the military commander, are void as a violation of the constitutional rights that attach to citizenship, and in that connection it will be our further contention that the war power of the Government of the United States does not diminish constitutional guaranties, particularly the guaranties attaching to citizenship under the fourth, fifth and sixth amendments [5] to the Constitution of the United States.

The Court: Proceed.

Mr. Donaugh: We will call Sergeant W. H. Mass.

WILLIAM H. MAAS

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. William H. Maas.

The Clerk: Spell the last name.

A. (Spelling) M-a-a-s.

(The witness was thereupon duly sworn.)

Exhibit X—(Continued)
(Testimony of William H. Maas.)

Direct Examination

By Mr. Donaugh:

Q. Your name is W. H. Maas?

A. That is right.

Q. And you are a Sergeant with the Portland Police Department? A. Yes, sir.

Q. Were you a Sergeant of the Portland Police Department on and about May 28th and May 29th, 1942? A. That isn't the date.

Q. You say you were?

A. You haven't got the date right there. [6]

Q. I say, were you a Sergeant of the Portland Police Department? A. Yes, sir.

Q. On or about March 29th, or March 28th, 1942? A. Yes, sir.

Q. Did you at any time have occasion to see Minoru Yasui, the defendant in this case?

A. Yes, sir.

Q. And interview him, at that time?

A. Yes, sir.

Q. Whereabouts did you see him?

A. He came into the Police Station.

Q. On what date? A. March 28th.

Q. March 28th? A. At 11:20.

Q. At what time?

A. Eleven-twenty P.M.

Q. Eleven-twenty P.M.? A. Yes, sir.

Q. And what took place when he came into the Police Station?

Exhibit X—(Continued)

(Testimony of William H. Maas.)

A. Why, he came in there and he told me that he wanted to be arrested, he wanted to test the constitutionality of that alien curfew law. He said he had been down in the North End; he asked several policemen down there to arrest him, but they [7] wouldn't do it, and so he came into the Station.

Q. Did you have any further conversation with him?

A. Well, he told me that he was an American citizen, lived at Hood River, and that he wanted to test this case for the Japanese.

Q. Was that the substance and the total of your conversation with him at that time?

A. That was about all, yes.

Q. And he was placed under arrest, was he?

A. Yes, sir.

Q. Have you had occasion at any time to talk to him again? A. No.

Q. Were other officers present with you when he came into the Station, or were you just there alone at that time?

A. I was there alone.

Mr. Donaugh: That is all, Sergeant.

Mr. Bernard: No cross-examination.

(Witness excused.)

-----....

Mr. Donaugh: We will call Mr. Quinn. [8]

Exhibit X—(Continued)

VINCENT M. QUINN

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Vincent M. Quinn.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donough:

Q. Just state your name, Mr. Quinn, full name.

A. Vincent A. Quinn.

Q. And what is your business or occupation?

A. Special Agent of the Federal Bureau of Investigation, assigned to the Portland Field Office.

Q. And when were you assigned to the Portland Field Office, about when?

A. Around October 1st, 1941.

Q. And are you now so assigned?

A. I am.

Q. Have been since your assignment?

A. Yes, I have.

Q. Have you had occasion, in connection with your official duties, to talk with, interview or contact the defendant, Minoru Yasui?

A. Yes, I have.

Q. Will you state when you did that? [9]

A. On January 12, 1942 Mr. Yasui visited our office, at which time he advised that he was return-

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

ing from Chicago, Illinois, where he had been employed by the Japanese Consulate. He stated that he was doing general secretarial work for the Consulate and that he resided at Hood River, Oregon. At that time he exhibited to me a card verifying the fact that he was registered with the Department of State as an agent for a foreign principal. The card was dated June 21, 1941. Mr. Yasui told me that he resigned—or, rather, withdrew his registration as an agent for a foreign principal on December 8th. He also advised—rather, he exhibited to me a certified copy of birth certificate which he had in his possession which had been issued by the Oregon Department of Health. This certificate stated that Mr. Yasui was born in Hood River, Oregon on October 11, 1916. His father's name was stated to be Masuo Yasui. Mr. Yasui also advised me that he was a Second Lieutenant in the United States Army and that he expected to report for a physical examination around January 19, 1942, at which time he thought he would be inducted into the active forces of the United States.

That, in substance, was the conversation I had on January 12th, 1942.

On April 3rd, 1942 I visited at the Portland Police Department, after our office had been advised that Mr. Yasui had surrendered himself, wishing to test the constitutionality of the curfew regulations, and I verified the record of the [10] Port-

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

land Police Department, which set forth that on March 28, at approximately 11:50 P.M., Mr. Yasui appeared and surrendered himself, at which time he stated that he desired to test the constitutionality of the curfew regulations.

Q. In connection with your conversation and reference by the defendant to his parents, as you have previously testified, did he make any statement as to the nationality of his parents?

A. Yes, he did. He told me they were Japanese aliens. It was also disclosed on the certified copy of his birth certificate that both of the parents were born in Japan.

Q. Do you know how long the family or the parents of the defendant have lived at Hood River? Was that discussed at any time?

A. That was not discussed at the time, although Mr. Yasui told me that his father at that time was not at Hood River.

Q. Was any information given you concerning the subject's—or defendant's education, as to where he attended school in this country, or when?

A. Yes, he stated that he had graduated from the University of Oregon. I don't recall the dates or the year he graduated, although he probably did tell me. He stated that he had been admitted to practice before the local courts and that he was an attorney at law.

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

Q. Do you know how long he was employed by the Japanese Consul General in Chicago?

A. I believe he told me that he registered with the Secretary of [11] State at the time he commenced his employment, and the card was dated June 21, 1941, as I recall.

Q. Now, you mentioned that he withdrew from such employment on, did you say, December 9th?

A. December 8th.

Q. December 8th.

A. The day after the declaration of war with Japan.

Q. When you refer to December 8th, you mean December 8th of what year? A. 1941.

Q. You testified a moment ago in regard to the defendant holding a commission in the United States Army. Do you know how he acquired that commission, or when?

A. He advised me that he acquired the commission by taking a reserve officers' training course while attending the University of Oregon, R.O.T.C. course.

Q. And he still held that commission at the time you talked with him?

A. He stated that he did.

Q. And when did he see you?

A. January 12th of this year.

Q. January 12th of this year, 1942?

A. That is right.

Mr. Donaugh: That is all, Mr. Quinn. [12]

Exhibit X—(Continued)
(Testimony of Vincent M. Quinn.)

Cross Examination

By Mr. Bernard:

Q. Just a moment; I want to ask you a question or two, Mr. Quinn. Your first contact with this man was on January 12th, was it?

A. That is right.

Q. And did he come to your office voluntarily, or had you sent for him?

A. He came to the office voluntarily.

Q. And did he state what the purpose of his call was? A. He did.

Q. What was it?

A. He stated that he came to the office to inquire as to whether or not he could assist his father in any way. His father at the time was in Federal custody. He had been apprehended as an alien enemy.

Q. Well, you mean he had been taken into custody up at Hood River as an alien enemy?

A. That is right.

Q. You don't mean by "apprehended" that he had been in hiding any place, do you?

A. No, I don't.

Q. And then after discussing that matter how did you get onto the discussion of Mr. Minoru Yasui himself?

A. Minoru Yasui volunteered the information given to me. [13]

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

Q. And he told you that he had been employed in the Japanese Consul's office at Chicago?

A. That is right.

Q. Did he tell you in what capacity he had been employed?

A. He stated that he was doing general secretarial work and acting somewhat as a clerk.

Q. Do you know whether or not American people were likewise employed in that office?

A. I do not know that.

Q. You have made no investigation?

A. I have not.

Q. And did he voluntarily exhibit this card to you?

A. He did.

Q. And what was on that card?

A. It was a card issued by the United States Secretary of State, which set forth that he had registered on June 21, 1941, as an agent for a foreign principal.

Q. Do you know whether all employees in foreign consuls' offices have to be similarly registered?

A. I understand they are supposed to be registered.

Q. All employees?

A. That is right, if they are an agent for a foreign principal.

Mr. Bernard: Well, let's see,—will you hand this to the witness, please. And mark it, please.

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

(The card referred to, so produced, was thereupon [14] marked for identification as Defendant's Exhibit 1.)

Mr. Bernard: Q. Will you please examine Defendant's Exhibit 1 for identification and tell me if that is the card that the defendant exhibited to you on the occasion to which you have referred?

A. That is the card.

Mr. Bernard: We will offer the card in evidence, your Honor.

The Court: Admission is refused at the present time. You may introduce it in your case in chief.

Mr. Bernard: All right.

Q. Did he tell you when he had resigned this position in Chicago?

A. Yes, he did. He stated that he had notified the Secretary of State on December 8th, 1942. He stated that his father requested him to do so.

Q. Well, did he tell you that he had resigned his position on that date?

A. Yes, he did.

Q. And did you cause any check to be made at the office of the Secretary of State to find out if he had in fact notified the Secretary of State on that date that he had resigned his position?

A. No, I did not.

Q. Did he tell you that he had immediately on December 8th wired the military authorities offering his services in the [15] Army of the United States?

Exhibit X—(Continued)

(Testimony of Vincent M. Quinn.)

A. I don't recall that he told me that, although I do recall him stating that he expected to be called for a physical examination, to be inducted in the armed forces, around January 19th, the following week.

Mr. Bernard: I think that is all, Mr. Quinn.

(Witness excused.)

Mr. Donaugh: Call Mr. Mize.

RAY MIZE

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Ray Mize.

The Clerk: (Spelling) M-i-z-e?

A. Yes.

(The witness was thereupon duly sworn.)

Mr. Bernard: My attention has just been called to the fact, your Honor, that I think the last witness misspoke himself; he referred to December, 1942. I am assuming he meant 1941.

Mr. Donaugh: I had understood him to say 1941, but if there is any doubt about it I would like to recall him.

Exhibit X—(Continued)

(Testimony of Ray Mize.)

The Court: All right, recall him at this time. [16]

Mr. Donough: Yes, recall Mr. Quinn.

(Witness excused.)

VINCENT M. QUINN

was thereupon recalled as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified further as follows:

Redirect Examination

By Mr. Donough:

Q. You testified, Mr. Quinn, in regard to a certain date, I believe, December 8.

A. That is right.

Q. What year did you refer to in that connection? A. 1941.

Mr. Bernard: That is all right.

Mr. Donough: Q. And you saw the defendant when?

A. I saw the defendant personally on January 12, 1942.

Mr. Donough: Yes. That is all.

Mr. Bernard: That is all, Mr. Quinn.

(Witness excused.) [17]

Exhibit X—(Continued)

RAY MIZE

thereupon resumed the stand as a witness in behalf of the United States of America, plaintiff herein, and, having previously been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Donough:

Q. Will you state your name, please.

A. Ray Mize.

Q. And what is your business or profession, Mr. Mize?

A. Special Agent of the Federal Bureau of Investigation, Portland Field Division.

Q. And how long have you been assigned to the Portland Field Division?

A. Approximately three months.

Q. And you have been assigned to this Division since three months ago, continuously since three months ago?

A. I have, sir.

Q. Have you had occasion to make an investigation or to interview or contact the defendant, Minoru Yasui?

A. I had occasion to interview the defendant.

Q. When was that, Mr. Mize?

A. On March 30, 1942.

Q. And at what place and where?

A. In the office of the Federal Bureau of Investigation.

Q. Here in Portland? [18]

Exhibit X—(Continued)

(Testimony of Ray Mize.)

A. Yes, sir.

Q. Will you state the occasion for talking to him at that time?

A. Yes; at my request, Mr. Yasui called at the office for the purpose of being questioned as to violation of the curfew regulation. He voluntarily appeared and I discussed the same with him for approximately an hour on the evening of that date.

Q. Just what was the nature of your interview with him? What was said?

A. Mr. Yasui discussed with me a little bit of his background history, which indicated that he had attempted—had lived in Hood River, Oregon, had attended high school there, and had also attended the University of Oregon, where he had graduated from the Law School in 1939. Subsequent to that time he had practiced law for a brief period in Hood River and in Portland, after which time and during the first part of 1940 he had accepted a position, secretarial or clerical, with the Japanese Consulate in Chicago, Illinois.

Q. You say he started to work there when?

A. The first part of 1940. I don't recall the exact month, although he gave it to me. And he stated that he had resigned that position at the time the Pearl Harbor incident occurred. I asked him the reasons for his resignation at that time, and he indicated that he did not feel that he could be a loyal American citizen and at the same time be

Exhibit X—(Continued)

(Testimony of Ray Mize.)

employed as an agent for the Japanese government. He advised, also, that he held [19] a commission in the Reserve Officers Training Corps, which he had received on his graduation from the University of Oregon in Eugene. I discussed with him the violation of the curfew regulation, and he stated that he had given himself up voluntarily at the local Police Department here for the purpose of testing the constitutionality of the regulation itself. I asked him the reason for doing that, and he stated that he was an American citizen of Japanese descent and that he felt that a regulation such as the one that was being imposed was unconstitutional, in that it was a discrimination against one group of United States citizens and the same regulation did not apply to all citizens, and he felt that the large majority of the Japanese citizens in this country were loyal to this country and wanted to do their part in the present war and that they could not do their part in the present war under the restriction which was being discussed at that time. I discussed with him briefly the war itself and asked him whether he felt that the Japanese government had acted fair and square in the present war, and he said frankly that he did not think that the Japanese government had, and as a result American citizens of Japanese descent in this country were being called upon to be unjustly discriminated against and suffer for the crimes of another, and under the

Exhibit X—(Continued)

(Testimony of Ray Mize.)

United States Constitution no person should suffer for the crimes of another one, indicating that the Japanese government had been the criminal and American citizens of Japanese descent [20] in this country were being subjected to unjust treatment as a result of that. I asked him if he felt that during these particular times his action would reflect very favorably on the Japanese colony, and Mr. Yasui stated that when thinking it over he did not think that it would be a very good reflection and that he in a certain sense was sorry that he had taken the action that he had.

Q. That was the substance of your interview with him at that time?

A. That is the substance of the interview, Mr. Donaugh, at that time.

Q. Did you have occasion to see him at any later period at all? A. I did not.

Q. You were not present when he called at the office of the FBI at some previous time?

A. I was not assigned to this office at that time and was not present.

Mr. Donaugh: May it please your Honor, at this time I should like to submit this document to be marked as Government's Exhibit Number 2 for identification.

(Certified copy of Foreign Official Status Notification, so produced, was thereupon marked for identification as Government's Exhibit 2.)

Exhibit X—(Continued)

(Testimony of Ray Mize.)

The Court: The witness suggests, Mr. Donaugh, that he did not complete his answer, apparently that he had forgotten something.

Mr. Donaugh: Oh, I see. [21]

A. In addition, with the Court's permission and counsel's permission, I have another point that I would like to bring up. I asked Mr. Yasui what he would do if he was in charge, in command of the West Coast here, and an invasion of this country was very probable, and I asked him what he would do to be very sure that the internal security of this country would be absolutely protected, and Mr. Yasui said, "Well, that is a rather hard question at this time", but after due hesitation he finally stated that "I feel I would intern all Japanese aliens and Japanese citizens." That is all.

Mr. Bernard: I have no objection to the document.

The Court: Admitted.

Mr. Donaugh: I should like to offer this in evidence, your Honor.

(The document referred to, having previously been marked for identification, was thereupon marked received as Government's Exhibit 2.)

Mr. Donaugh: May it please your Honor, reading from Government's Exhibit Number 2, a certificate from the Secretary of State, Washington, D. C., dated June 17, 1941, shows that the defend-

Exhibit X—(Continued)

(Testimony of Ray Mize.)

ant Minoru Yasui registered as an employee of the Consulate General of Japan at Chicago, Illinois, in the capacity of secretary.

“Date of assumption of present duties, April 1, 1940.”

Performance—or, rather, the defendant’s present and [22] proposed activities, including place or places of performance: “Secretarial work, and research; to be performed for the Consulate General of Japan, at Chicago, Illinois.”

“Nature and place or places of occupation or employment during the last five years” is set forth as “September, 1933 to June, 1939, student, at University of Oregon, Eugene, Oregon. June, 1939 to November, 1939, ranch hand, Hood River, Oregon. November, 1939 to April, 1940, practice of law, Portland, Oregon. April, 1940 to present date, secretary, Consulate General of Japan, Chicago, Ill.”

Bearing the defendant’s signature and photograph.

At this time, your Honor, I should like to ask that these four documents be marked for identification in the order in which I am handing them to the bailiff.

(The documents referred to, so produced, were thereupon marked as follows:

Certified copy of letter, bearing date March 2, 1942, Henry L. Stimson, Secretary of War, to Lieutenant General John L. DeWitt, Com-

Exhibit X—(Continued)

(Testimony of Ray Mize.)

mander, Western Defense Command, was marked for identification as Government's Exhibit 3;

Certified copy of Public Proclamation No. 1, Headquarters, Western Defense Command and Fourth Army, bearing date March 2, 1942, was marked for identification as Government's Exhibit 4; [23]

Certified copy of Public Proclamation No. 3, Headquarters, Western Defense Command and Fourth Army, bearing date March 24, 1942, was marked for identification as Government's Exhibit 5;

Certified copy of Public Proclamation No. 5, Headquarters, Western Defense Command and Fourth Army, bearing date March 30, 1942, was marked for identification as Government's Exhibit 6.)

Mr. Donaugh: I should like to display these to counsel, please.

The Court: Yes.

Mr. Bernard: No objection.

Mr. Donaugh: At this time, your Honor, I desire to offer in evidence Government's Exhibits 3, 4, 5 and 6.

The Court: Any objection?

Mr. Bernard: No objection.

The Court: They are admitted.

Mr. Donaugh: These documents being certified

Exhibit X—(Continued)

(Testimony of Ray Mize.)

copies of the authority of General J. L. DeWitt and Public Proclamations 1, 3 and 5 issued by Lieutenant General J. L. DeWitt, United States Army, Commanding The Western Defense Command and Fourth Army.

(The documents referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibits 3, 4, 5 and 6.) [24]

Mr. Donagh: You may cross-examine.

The Court: Reading is waived, I take it?

Mr. Bernard: Yes, we will waive the reading of them at this time, your Honor.

Cross Examination

By Mr. Bernard:

Q. There was just one statement, Mr. Mize, I didn't get quite clearly and I would like to check with you. Did I understand you to say that he told you that the reason that he had resigned was that he felt that he then could not be a loyal American and keep his employment in the Consul General's office?

A. He implied as much, Mr. Bernard.

Mr. Bernard: That is all.

Mr. Donagh: That is all, Mr. Mize.

Mr. Bernard: Oh, wait, there is one question: Did you ever get any message, left on your desk or otherwise, that Mr. Yasui had called to see you again and you were not in?

Exhibit X—(Continued)

(Testimony of Ray Mize.)

A. Not that I recall, Mr. Bernard.

Mr. Bernard: That is all.

(Witness excused.)

Mr. Donaugh: Call Mr. Wagner. [25]

DEWART E. WAGNER

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Dewart E. Wagner.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donaugh:

Q. Now, Mr. Wagner, if you will state your name for the record, please.

A. I believe he has it: Dewart E. Wagner.

Q. And what is your business or occupation, Mr. Wagner?

A. I am Director of Vital Statistics for the State of Oregon.

Q. And for what department?

A. Vital Statistics, in the State Board of Health.

Q. State Board of Health; and where are your headquarters?

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

A. Fifth and Oak, Oregon Building.

Q. And what do you mean by the Department of Vital Statistics?

A. We receive and file all birth and death certificates for the State of Oregon.

Q. That includes Hood River County, Oregon?

A. Yes.

Q. How long have you been so employed?

A. Six years. [26]

Q. And continuously for the past six years?

A. Except for one year when I had leave of absence.

Q. And in connection with your official duties do you have the custody of the birth records in the state of Oregon as possessed by your department at this time? A. I do.

Q. What records, if any, do you have concerning the defendant, Minoru Yasui?

A. I have a record here, which I was requested to look up, which is a birth certificate of a child named Minoru Yasui, born October 19, 1916, in Hood River.

Q. Any other information shown on the certificate as to parentage, race, any information pertaining as to who the individual is?

A. Parentage, Masuo Yasui and Shidzu Miyake; residence, Hood River, Oregon; race of father, Japanese, aged 29; race of mother, Japanese, aged

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

27. Birthplace of father, Japan; birthplace of mother, Japan. Occupation of father, merchant. This certificate was filed at the time of birth.

Q. That is an official State record of your office, is that right? A. Yes.

Q. Is the page detachable, Mr. Wagner?

A. Not, it is not. The handwriting on the bottom is that of——

Q. (Interrupting) I mean is the page detachable from your book?

A. It is not. It was bound in 1916. [27]

Mr. Donaugh: At this time, your Honor, I should like to have the document from which the witness has testified marked for identification.

Mr. Bernard: No objection.

Mr. Donaugh: Q. Pardon me, Mr. Wagner, do you have a certified copy of this document with you?

A. I do not. I could procure one.

Mr. Bernard: Mr. Burdell spoke to me about this the other day. I told him that I had a certified copy of the birth record, which I hold in my hand, which I would make available to him if he wanted it. I have also made a copy of that in our office, which has been checked very carefully, and if this certified copy of ours is used I would like to have the copy substituted in its place, as the Japanese find it necessary to have these birth certificates in their possession.

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

Mr. Donaugh: The Government is not doubting the authenticity of the copy, and yet I believe that if later this document is to be replaced it could be replaced by a certified copy. I was going to suggest to your Honor when this has been examined and I move for its admission it is with the proviso that it may later be released and a certified copy substituted for the record.

The Court: Mark it for identification.

(Certificate of Birth of Minoru Yasui, registered No. 159, Oregon State Board of Health, Division of Vital Statistics, page numbered 154, so pro- [28] duced, was thereupon marked for identification as Government's Exhibit 7.)

Mr. Bernard: No objection.

Mr. Donaugh: At this time I desire to offer the exhibit in evidence.

The Court: It may be received without objection.

(The document referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 7.)

Mr. Donaugh: May we at a later time, your Honor, substitute a certified copy for the exhibit so received?

The Court: The Court at a later period will receive favorably a motion to remove this original

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

from the files and substitute a photostatic copy of both sides of the document, if there is no objection.

Mr. Bernard: No objection, your Honor.

The Witness: May I ask a question, your Honor?

The Court: Yes.

A. I could have that back, however, can I not?

The Court: What?

A. I can take the book back with me? We will be seriously crippled in our office without it.

The Court: Well, I am sorry, but you can't. Proceed.

Mr. Donaugh: That is all, Mr. Wagner. [29]

Cross-Examination

By Mr. Bernard:

Q. I think you read all of that document except one entry. It lists the occupation of the mother as housewife. A. I don't recall.

Q. That is all right; it is in evidence. Will you hand it to the witness and let him — because everything else has been read into the record, and that was my recollection. You read the occupation of the father from the certificate. What is the occupation of the mother? A. Housewife.

Mr. Bernard: That is all.

Mr. Donaugh: That is all, Mr. Wagner.

The Witness: Your Honor, we need this book badly, and in my official capacity could I detach

Exhibit X—(Continued)

(Testimony of Dewart E. Wagner.)

that page, to be replaced later? Many deserving people will be out of work, and there are boys in this book who are joining the Army and Navy that have to have their birth certificates immediately, and if we don't have this book—on my authority can I take out the page, to be replaced later, and take the book back?

The Court: As far as this Court is concerned, it is introduced in evidence. If you want to make arrangement with the United States Attorney it is all right, but as far as the Court is concerned the book is in evidence and must remain there. Talk to the United States Attorney, if you wish.

(Witness excused.) [30]

Mr. Donaugh: This case has progressed a little more rapidly than the Government had anticipated, your Honor. We had one witness whom we desired to present who is not here, but I think he may be replaced by another witness, if I could have a little time.

The Court: It is now eleven o'clock. The Court will be in recess.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

Mr. Donaugh: May it please your Honor, two witnesses for the Government who in our opinion have material testimony are not at the moment available. One man is on his way here to Portland who lives out of the city and will be here at 1:30.

Exhibit X—(Continued)

One witness is a resident of Portland, and I have requested him to immediately come to the Court House, but it will be a few minutes before he can come here. At this time, if the Court is agreeable, we should like to have sufficient time for these witnesses to come here and be available in this case. The Government takes the responsibility for the man who is not here. I had rather anticipated that we would not get to him before 1:30 and I told him this morning by telephone that if he was here by 1:30 I thought that would be sufficient, but I find that we are in error as to this particular man.

The Court: Any objection on the part of the defense?

Mr. Bernard: No, your Honor. [31]

The Court: The Court will adjourn these proceedings until two o'clock this afternoon.

Mr. Bernard: I might state to your Honor that I have prepared a memorandum in this case and I intended to hand it up to your Honor when the case started, but I will do that now.

The Court: Have you served a copy on the Government?

Mr. Bernard: Yes, I will give them a copy now.

The Court: Have you been served with the Government's brief, Mr. Bernard?

Mr. Bernard: Yes, I got a copy of it this morning, your Honor.

Exhibit X—(Continued)

The Court: Court is in recess until two o'clock.

(At 11:25 o'clock A. M., Friday, June 12, 1942, a recess was had until 2:00 P. M.) [32]

Afternoon Session

2:05 P. M.

Mr. Donough: Call Mr. Davis.

ALAN DAVIS

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your full name, please.

A. Alan Davis.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donough:

Q. State your name, Mr. Davis.

A. Alan Davis.

Q. And you are engaged in what business or occupation?

A. Special Agent, Federal Bureau of Investigation.

Q. And were you a Special Agent of the Federal Bureau of Investigation in March, 1942?

A. I was.

Exhibit X—(Continued)

(Testimony of Alan Davis.)

Q. And where were you stationed during that time? A. The Portland office.

Q. Did you have occasion to talk to the defendant, Minoru Yasui? A. Yes, sir.

Q. Will you state when and where you talked to him?

A. It was in the late afternoon of March 30th, 1942, in the [33] Portland office, Portland Field Division.

Q. And by that you mean the Federal Bureau of Investigation? A. Yes, sir.

Q. Anyone present besides yourself?

A. Yes; Special Agent Mize, of the FBI.

Q. Will you state the nature of the conversation you had with the defendant at that time.

A. Mr. Mize had been discussing affairs with Mr. Yasui at the time I entered the room, and I had previously known Mr. Yasui at the University of Oregon and I started talking with him, regular conversation. Mr. Mize was asking certain questions, and we were discussing the patriotism of the Japanese, and, as I recall, the question was asked Mr. Yasui by Mr. Mize as to the loyalty of the Japanese in Oregon, whether he could depend upon them or say that he could depend upon them in case there might be an attempted invasion in this country, whether he, who might be in charge of the affairs in this country, would detain all the Japanese, including the aliens as well as the American-

Exhibit X—(Continued)

(Testimony of Alan Davis.)

born Japanese citizens. Mr. Yasui at that time more or less hesitated in answering the question, but he stated quite definitely that he would intern not only the aliens but also the American-born Japanese in that case. We discussed various other things. Most of them were mostly our school days and things that had no interest in this matter.

Q. You had known the defendant previously, had you? [34]

A. Yes, sir.

Q. At the University of Oregon?

A. Law School and prior to our entrance in Law School, yes, sir.

Q. Now, the circumstances under which Mr. Yasui talked with you and with Mr. Mize were what? Where were you and what were the surrounding circumstances and conditions under which he talked and discussed this matter with you?

A. Well, as I can recall, Mr. Yasui had been in the office previously and we had discussed various things. He had been arrested by the Portland Police Department for violation of the curfew and he was at the office, I believe, to see Special Agent Quinn and I had merely talked and said "Hello" to him at that time, and it was on March 30th that he was up talking with Mr. Mize in the afternoon and I walked into the office and started in talking with him at that time. I was not trying to solicit any information from him regarding Japanese activities or his own activity, merely

Exhibit X—(Continued)

(Testimony of Alan Davis.)

sitting in more or less in the interview that Mr. Mize was conducting.

Q. Was there any discussion at all as to what consideration he would receive by you should he testify or speak to you about this matter?

A. No, sir.

Q. No threats or——

A. (Interrupting) No, sir.

Q. (Continuing) ——duress of any kind? [35]

A. No, sir.

Q. Promises? A. None.

Q. He seemed to be, other than the matter of hesitation you speak of, he seemed to be talking freely and with ease to you? A. Yes, sir.

Q. Was that the only occasion that you discussed this case with him?

A. We had talked prior to that, I think a week or so before that. I had made no notes on it and I cannot recall the discussion, although we did discuss that it was the Japanese that were at war and we talked of that, and we talked of his employment with the Japanese Consul in Chicago. We told him—I was more or less curious at the time whether agents had contacted him while he was at Chicago, and we discussed that matter.

Mr. Donagh: I think that is all.

Cross Examination

By Mr. Bernard:

Q. Now, as I understand it, Mr. Davis, you came

Exhibit X—(Continued)

(Testimony of Alan Davis.)

in on March 30th when Mr. Yasui had already been engaging in a conversation with Mr. Mize?

A. Yes, sir.

Q. And something came up about locking up the Japanese to prevent sabotage?

A. I did not mention sabotage, no, sir. [36]

Q. Locking them up for what purpose?

A. Well, for protection of this country.

Q. Well, in what way?

A. Well, I would assume that he meant that he would be unable to trust the Japanese on the West Coast.

Q. Pardon me, I am asking you what he said about that. I want to know what he said about that.

A. Well, he stated that if he had anything to do with it and there might be an attempted invasion of this country he would detain aliens as well as the citizens.

Q. And how did he come to say that, do you remember? What brought that up?

A. The question was asked by Mr. Mize, as I recall, that if he should be in charge of military affairs in this country, or on the West Coast, what he might do under those circumstances.

Q. Now, let me refresh your recollection. Isn't this about what happened, that somebody was pressing the subject as to how the commander of the army would be absolutely sure of the protection of the country without locking up the Japanese, and

Exhibit X—(Continued)

(Testimony of Alan Davis.)

Mr. Yasui said, "Well, if you wanted to be absolutely sure I suppose they would be locked up", and that somebody remarked, "To the same extent that if God wanted to be absolutely sure that there wouldn't be any wars fought, why, we should kill off all the human beings." Now, does that refresh your recollection any? A. No, sir. [37]

Mr. Bernard: I see. That is all.

Mr. Donaugh: That is all, Mr. Davis.

(Witness excused.)

Mr. Donaugh: At this time we call Dr. Everson. [38]

W. G. EVERSON

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. W. G. Everson.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donaugh:

Q. Now, Dr. Everson, your full name is William G. Everson? A. William G. Everson.

Q. And what is your profession, Doctor?

A. President, Linfield College.

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

Q. At McMinnville, Oregon?

A. At McMinnville, Oregon.

Q. And prior to that you were located where?

A. As pastor of the First Baptist Church, the White Temple, Portland, Oregon.

Q. I believe you have had military experience, Doctor? A. Yes, sir.

Q. At one time you held a commission in the United States Army? A. Yes, sir.

Q. What was the highest rank you achieved in the United States Army?

A. As a Major General, Chief of the National Guard Bureau.

Q. And during what period were you the Chief of the National [39] Guard Bureau?

A. About '29-'31.

Q. Do you occupy any official position in connection with the war activities at the present time?

A. Chairman, Enemy Alien Hearing Board.

Q. And for what locality or district?

A. District of Oregon.

Q. And you were appointed by whom?

A. By the United States Attorney, Mr. Biddle.

Q. United States Attorney General?

A. United States Attorney General, Mr. Biddle.

Q. Now, in connection with your duties as Chairman of the Alien Enemy Hearing Board for Oregon, have you or the other members of the Board

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

in association with you at any time contacted or interviewed the defendant, Minoru Yasui?

A. Yes, we had some contacts with him during his hearing in February, February 3rd, at Missoula, Montana, and this was in connection with a hearing conducted in behalf of his father; this young man appeared in behalf of his father.

Q. And this hearing was held where?

A. At Missoula, Montana, Fort Missoula.

Q. Fort Missoula, Montana? A. Yes, sir.

Q. And the father of the defendant was confined at Fort Missoula at that time? [40]

A. Yes, sir.

Q. Do you know his nationality?

A. Japanese.

Q. Japanese; and did the father appear before the Alien Enemy Hearing Board and yourself?

A. Yes, sir.

Q. And in what capacity was the defendant there? Why was he there?

A. The regulations permit a friend or a relative to appear, and the son appeared as a relative to testify in behalf of his father.

Q. Did he in so testifying discuss himself and his own activities?

A. Yes. He informed us that he was a Second Lieutenant in the United States Reserve and was to be ordered to active duty inside of two weeks, and when he made that statement I asked him if he

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

had received orders for his physical examination. He said, "No", and I asked that question because I felt that anyone being ordered up for active duty inside of two weeks would certainly have orders for physical examination; and I asked him why he knew he was to be ordered up inside of two weeks, and he said that was the normal procedure.

Mr. Bernard: I didn't get the last part of that answer.

A. When I asked him why he knew that he was to be ordered up for active duty inside of two weeks he said, "That is the normal procedure." [41]

Mr. Donaugh: Q. Was anything said in your presence, Doctor, concerning the employment of the defendant and where he had been employed prior to his appearance before your Board?

A. Yes; he was employed in connection with the Consul General's office in Chicago up to the——

Q. (Interrupting) What Consul General's office?

A. The Japanese Consul General's office in Chicago,—up to December 7th, when he stated he had resigned.

Q. Do you recall if anything was said concerning how he happened to be employed by the Japanese Consul General in Chicago?

A. Yes; he said that the information was that the Japanese Consul General appointed by the authorities in Japan was to arrive in San Francisco,

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

and his father sent a letter of recommendation which secured for him the appointment as a secretary, and then afterwards this developed into a public relations assignment.

Q. Do you recall if anything was said as to the period of time during which he applied for a secretary's job? In other words, the ease or the difficulty with which he secured his position with the Japanese Consul General?

A. There seemed to be no difficulty at all and all that was necessary was the writing of a letter and the appointment came through immediately.

Q. And by the writing of the letter you mean the letter of the father to which you testified?

A. The letter of the father to this Japanese Consul General. [42]

Q. Now, when this statement was made was the father present? A. Yes.

Q. And heard the defendant make the statement to which you are now testifying? A. Yes.

Q. Now, I believe you stated that he first was employed as a secretary? A. Yes, sir.

Q. And then later in what capacity?

A. As public relations man in behalf of the Consul General.

Q. Did he explain what he meant by "public relations man"?

A. Yes; he said he wrote a good many letters and made speeches, and these speeches were in behalf

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

of the Japanese program in opposition to the Chinese; and he also stated that these speeches were usually looked over by the Japanese Consul General.

Q. And by that statement, Doctor, when you state that the Japanese Consul General looked over these speeches, do you mean by that—when do you mean he looked over these speeches?

A. Prior to the delivery.

Q. How many of these speeches were delivered?

A. I do not know.

Q. Well, do you recall whether there was any statement made as to whether one speech was delivered or more than one?

A. Yes, he said that he delivered several speeches, and I recall he referred, as one illustrative, to Kankakee. [43]

Q. Do you know how the invitations were received which caused the defendant to go out and deliver these speeches on behalf of the Japanese Consul General?

A. No, I do not.

Q. Was anything said concerning the commission of the defendant in the United States Army during this time of employment by the Japanese Consul General and the delivery of these speeches, in behalf of the defendant? (Sic)

A. He held his commission during this period, commissioned on graduation because he was con-

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

nected with the R. O. T. C. at a state institution, the University.

Mr. Donaugh: I believe that is all, Doctor.

Cross Examination

By Mr. Bernard:

Q. Doctor, I didn't get exactly that part of your testimony where you mentioned the name "Kankakee". What was there about that? I didn't follow you there.

A. I understood that the statement was made that he gave speeches in various civic groups through organizations in towns around Chicago, and there may have been several towns mentioned but the only one that lingers in my mind was Kankakee. Now, why that should linger I don't know, but that was brought up in connection with the statement.

Q. Dr. Everson, just one thing in regard to your testimony: Do you recall him saying up there that in order to get this position [44] in Chicago that he also got letter of recommendations from Wayne L. Morse, Dean of the University of Oregon Law School?

A. No, I do not.

Q. You don't recall that?

A. No, sir.

Q. He might have said that?

A. I do not recall.

Q. You do not recall, but it might have slipped your memory?

A. I do not recall it.

Exhibit X—(Continued)

(Testimony of W. G. Everson.)

Mr. Bernard: I see. That is all.

Mr. Donough: That is all, Doctor.

(Witness excused.)

Mr. Donough: Call Mr. Scott. [45]

LESLIE M. SCOTT

was thereupon produced as a witness in behalf of the United States of America, plaintiff herein, and was examined and testified as follows:

The Clerk: State your name, please.

A. Leslie M. Scott.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Donough:

Q. Your name is Leslie M. Scott?

A. That is correct.

Q. And I believe, Mr. Scott, that you are the State Treasurer of Oregon? A. I am.

Q. Have you had any connection, Mr. Scott, with the alien enemy situation in Oregon?

A. A member of the Board for this state.

Q. Of the Alien Enemy Hearing Board?

A. Yes.

Q. And in connection with your duties as a member of the Alien Enemy Hearing Board have you before today seen the defendant or have you

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

talked with him or he talked in your presence at any time?

A. At Fort Missoula, on February 3rd, at a hearing of the Board, Mr. Yasui testified in behalf of his father. [46]

Q. And that was where?

A. At Fort Missoula, Montana.

Q. Do you recall, Mr. Scott, what the defendant on that occasion said with respect to his own activities and employment? Did he state to the Board anything concerning himself?

A. He did. In response to inquiries of members of the Board he stated that he had been in the service of the Japanese Consul General at Chicago as secretary to the Consul General and as a public relations agent or representative.

Q. Was anything said in regard to his duties as public relations representative?

A. He was to attend to the correspondence of the Consul General, he, Mr. Yasui, having ready command of English, and he was to make speeches on subjects approved by the Consul General. The subject matter of these speeches was approved by the Consul General.

Q. Was anything said as to how many speeches were delivered or how active the defendant was in that connection?

A. I don't know how numerous they were. I gained the impression that they were rendered on

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

a number of occasions before groups of American citizens.

Q. Did he say what the subjects of these talks were?

A. They pertained to the conduct of the Japanese war against the Chinese, justification of Japanese policy toward China, in justification of the war against China. [47]

Q. Was there any discussion had before your Board concerning the delivery of these speeches by the subject, or, rather, the defendant, as an employee of the Japanese Consul General's office and also as an officer in the United States Army?

A. The method of his gaining this employment was narrated by Mr. Yasui in response to questions of members of our Board. He said that he had graduated a short time before from the University of Oregon Law School, and his father was desirous of making a connection for him with the Japanese Consul General. His father had heard that the Japanese Consul General was soon to land in San Francisco, coming from Japan. The father, Mr. Yasui, wrote a letter—this was brought out in the testimony given by Mr. Yasui, Junior,—the father wrote a letter to the Consul General at San Francisco describing the qualifications of the young man and furnishing a number of recommendations. What the recommendations were or from whom, I

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

don't believe they were mentioned at the time of this hearing, or how many such letters there were.

Q. I take it, then, from your testimony that his employment with the Japanese Consul General was on the basis of the recommendation of his father, is that correct?

A. That was the distinct impression that the Board received.

Q. And the father was also before your Board?

A. The father was before our Board at the time and the son appeared as friend or relative or advisor of his father.

Q. And the hearing that you conducted and the purpose of your [48] Board being in Fort Missoula concerned the father, do I understand?

A. It concerned the father and not the son.

Q. And what was the nationality of the father?

A. The father is a native-born Japanese. The son, it was brought out before the Board, was born in the United States; he was 25 years of age last February; at least, that was the testimony of himself. The father came to the—well, the father had given the son the advantages of an American education.

The Court: I take it, Mr. Donaugh, that these are things that were said by the defendant? I am not reviewing the testimony that may have happened or come in before the Board in Missoula which was not given by the defendant.

Mr. Donaugh: Q. As I understand your testi-

Exhibit X—(Continued)

(Testimony of Leslie M. Scott.)

mony, Mr. Scott, your testimony here is based on the testimony of the defendant before you at the time he appeared as a witness; is that correct?

A. That is correct.

Mr. Donaugh: I believe that is all at this time.

Mr. Bernard: That is all. No cross-examination.

(Witness excused.)

Mr. Donaugh: May it please your Honor, with the permission of the Court, may I at this time specifically, and for the purpose of the record, quote from the Government's Exhibits 3, 4, 5 and 6, as to the nature of the exhibits and what they imply.

Government's Exhibit Number 3 is a certified copy, [49] dated March 2, 1942, in the form of a letter directed by Henry L. Stimson, Secretary of War, to Lieutenant General John L. DeWitt, Commander, Western Defense Command, San Francisco, California. It states, in part, in paragraph one:

"By letter dated January 20, 1942, I designated you as one of the appropriate Military Commanders to exercise the powers vested in me under Executive Order No. 9066, February 19, 1942, and I delegated to you such powers as are necessary to carry out the purposes of that Executive Order."

Secretary Stimson follows with this line: "Incident to the exercise of those powers, you are authorized to employ without regard to Civil Service

Exhibit X—(Continued)

or Classification laws or regulations, all persons or agencies necessary to carry out your duties.”

The balance of paragraph one and paragraphs two and three have certain instructions and directions to General DeWitt with respect to the manner in which he may employ personnel to carry this order into execution.

Government’s Exhibit Number 4 is what is known as Public Proclamation No. 1, certified as an official copy, issued from the Headquarters, Western Defense Command and Fourth Army, The Presidio of San Francisco, California, under the signature of J. L. DeWitt, Lieutenant General, United States Army, Commanding, dated March 2, 1942, which recites:

“Whereas, By virtue of orders issued by the War [50] Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theater of Operations under my command; and

“Whereas, By Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in

Exhibit X—(Continued)

such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

“Whereas, The Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

“Whereas, The Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and [51] acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

“Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

Exhibit X—(Continued)

“1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.”

Then, your Honor, without reading further from the exhibit, from Government's Exhibit 4, there is herein set forth as Exhibit 1 a description of Military Area No. 1, and there is likewise herein set forth what is known as Exhibit No. 2, a sketch or map showing the territory previously described, in which a certain area along the Pacific Coast extending from the borderline of the Dominion of Canada south is marked under the “Military Area Legend”, “Prohibited Zone ‘A-1’”, and from this map it is shown that Portland is included in the area classified as “Prohibited Zone ‘A-1’”.

Government's Exhibit Number 5, this being an official certified copy, issued by Headquarters, Western Defense Command [52] and Fourth Army, Presidio of San Francisco, California, Public Proclamation No. 3, dated March 24, 1942, bearing signature “J. L. DeWitt, Lieutenant General, U. S. Army, Commanding.”

The recitation in Public Proclamation No. 3 is similar to the recitation of powers I have heretofore recited, with this specific provision:

“Whereas, The present situation within these

Exhibit X—(Continued)

Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

“Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the military Areas above described, or such portions thereof as are hereinafter mentioned:

“1. From and after 6:00 A.M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas [53] are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any

Exhibit X—(Continued)

of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M., which period is hereinafter referred to as the hours of curfew.”

This proclamation, Government's Exhibit Number 5, relates to other matters, with particular reference to a regulation concerning prohibited articles, which are not involved in this case.

Government's Exhibit No. 6 is a certified copy of Public Proclamation No. 5, likewise issued under the signature of J. L. DeWitt, Lieutenant General, U. S. Army, Commanding Western Defense Command and Fourth Army, and relates to Proclamations 1 and 2 heretofore issued, by setting forth the classes of persons which may be considered by the military authorities to be exempted from exclusion and evacuation upon furnishing of satisfactory proof to the military authorities.

May it please your Honor, at this time I should like to have these documents marked for identification.

(The documents referred to, so produced, were thereupon marked as follows: [54])

Certified copy of General Orders No. 1, Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California, dated December 11, 1941, signed “J. L. DeWitt, Lieutenant General, U. S. Army, Commanding”, was marked for identification Government's Exhibit 8;

Exhibit X—(Continued)

Certified copy of Telegram, bearing date December 11, 1941, addressed to "Commanding General, Fourth Army, Pres. of SF, Calif," signed "Marshall", was marked for identification as Government's Exhibit 9.)

Mr. Bernard: No objection.

Mr. Donaugh: At this time I desire to offer Government's Exhibits for identification Nos. 8 and 9 in evidence.

The Court: Admitted.

(The documents referred to so offered and received having previously been marked for identification were thereupon marked received as Government's Exhibits 8 and 9.)

Mr. Donaugh: Government's Exhibit Number 8 reads as follows:

"Headquarters Western Defense Command and
Fourth Army

"Presidio of San Francisco, California.

"December 11, 1941

"General Orders

"Number 1

"1. The following War Department radiogram, December 11, 1941, is quoted for the information and guidance of all concerned:

"The activation of the Western Defense Command [55] including Alaska, is hereby confirmed. It is designated as a theater of operations. The Fourth Army, Second Air

Exhibit X—(Continued)

Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as commander.

“2. Pursuant to the authority contained in the radiogram quoted above, the undersigned assumes command of the Western Defense Command and retains command of the Fourth Army.

“J. L. DeWITT,

“Lieutenant General, U. S.

“Army, Commanding.”

Government’s Exhibit Number 9 reads as follows:

Priority “Washington DC Dec 11, 1941 621PM

“Commanding General

“Fourth Army

“Pres of SF, Calif

“The activation of the Western Defense Command including Alaska, is hereby confirmed. It is designated as a theatre of operations. The Fourth Army, Second Air Force, Fourth Air Force and Ninth Corps Area, including attached units are assigned to this command. Lieutenant General John L. DeWitt is designated as commander.

“MARSHALL”

The Government rests, your Honor.

(Government rests.) [56]

Exhibit X—(Continued)

Defense Testimony.

Mr. Bernard: Mr. Yasui, will you take the stand.

MINORU YASUI,

the defendant herein, was thereupon produced as a witness in his own behalf and was examined and testified as follows:

The Clerk: Your name is Minoru Yasui? Just state your name. A. Minoru Yasui.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Bernard:

Q. Your name is Minoru Yasui?

A. That is correct.

Q. And you are the defendant in this criminal action, are you? A. I am, sir.

Q. The record introduced by the Government shows that your birth was on October 19, 1916, at Hood River, Oregon. Does that conform with your information that that is the date of your birth?

A. It does, sir.

Mr. Bernard: I would like to have this marked for identification, please.

(Stipulation entitled in the above entitled cause, between Charles S. Burdell, of attorneys of the United States of America, and E. F. Bernard, Attorney for the Defendant, was thereupon marked [57] for identification as Defendant's Exhibit 10.)

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Burdell: Oh, I have no objection.

The Court: Admitted.

(Said stipulation, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 10.)

Mr. Bernard: I would like to say, your Honor, this is a stipulation entered into by the Government and myself whereby certain facts are admitted in the case.

“In the District Court of the United States

“For the District of Oregon

“UNITED STATES OF AMERICA,

Plaintiff,

vs.

“MINORU YASUI,

Defendant.

STIPULATION

“It is hereby stipulated by the parties to the above entitled action that at the trial of the action the following facts are admitted to be true and proof thereof is waived, to wit:

“During and prior to the year 1916 and at the time of the birth of the defendant, Minoru Yasui, the father of the defendant, Masuo Yasui, and Shidzu Yasui Yasui, his wife, the mother of the

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

defendant were residents and inhabitants of Hood River, Oregon; that during all of [58] said time, the defendant's father hereinbefore named was engaged in business in Hood River, Oregon, as a merchant, and that during all of said times, the defendant's mother hereinbefore named was a housewife, and that neither of the defendant's said parents were in the diplomatic service of any country.

“CHARLES S. BURDELL,

Of Attorneys of the United
States of America

“E. F. BERNARD,

Attorney for the Defendant”

Mr. Burdell: May it be understood, your Honor, that that stipulation is only for the purpose of this case?

The Court: I don't know exactly what that means. Either it is a fact or it isn't a fact. In other words, this Court refuses to try some moot question that is set up by the attorneys for the defense and the Government.

Mr. Burdell: All right, it may be stipulated as a fact, your Honor.

The Court: Stipulation received in evidence.

Mr. Bernard: There has been introduced in evidence here a birth registration. Was your birth ever recorded in any other place?

A. No, it has not.

Q. And, in that connection, I will ask you

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

whether or not you have ever in your life time received any questionnaire or request for [59] information from the government of Japan relative to you or your willingness to engage in any military activity or any activity in Japan?

A. I have received no such questionnaire from the government of Japan.

Q. Or have you given any information voluntarily along that line?

A. No, sir, I have not.

Q. From your earliest recollection, Mr. Yasui, what was your father's business?

A. Well, from my earliest recollection he has always been a merchant in Hood River, Oregon.

Q. And did he engage in business as a merchant up to the time he was detained by the Government?

A. He was, together with agricultural pursuits and farming.

Q. And was your mother's occupation—did she continue as a housewife throughout the years?

A. She did.

Q. Did you ever take a trip to Japan?

A. Yes, sir, I did.

Q. In what year?

A. To the best of my recollection it was in 1925, I think at the age—when I was about eight years old. We left the United States sometime in July and returned approximately in September. It was just merely a summer vacation.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Was that merely a vacation trip? [60]

A. Yes, to the best of my recollection it was.

Q. Well, did anything particular happen that you recall in Japan at that time that impressed itself on your recollection?

A. Well, no particular factor, Mr. Bernard.

Q. Were you asked when you were over there to take any oath of allegiance or do anything towards taking out citizenship in Japan?

Mr. Burdell: Object to that as immaterial, your Honor.

The Court: The objection is sustained.

Mr. Bernard: I wish to make an offer of proof, your Honor. I offer to prove by this witness that while he was in Japan at that time he did not take an oath of allegiance to Japan or any other country or take any steps to become a citizen of Japan.

The Court: He couldn't. He was a minor. He had no election until after he had passed the age of twenty-one.

Mr. Bernard: I take it, then, the ruling is against me.

The Court: Yes; you may put in an offer of proof.

Mr. Bernard: I would like an exception.

The Court: You may state an offer of proof and I will——

Mr. Bernard: What is that?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

The Court: You may state an offer of proof and I will give you an exception.

Mr. Bernard: Well, I think I dictated it into the record. Will you read it.

(The offer of proof was thereupon read by the reporter.) [61]

Mr. Burdell: Object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained and the offer of proof is rejected.

Mr. Bernard: May we save an exception?

The Court: Yes, sir.

Mr. Bernard: Q. Where did you go to school?

A. Well, I started grammar school in Hood River; finished high schools, also, at Hood River.

Q. By the way, this trip that you took to Japan when you were about ten years old, were you ever in Japan after that?

A. No, sir, I have never been in Japan since that time.

Q. Were you ever in any foreign country after that?

A. Yes, I believe once in Mexico, in 1937; we crossed the border near some small town to the south of San Diego.

Q. And how long were you there?

A. I think four hours.

Q. Ever resided in any foreign country at all?

A. No, sir.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. After you finished high school in Hood River where did you go to school?

A. I attended the University of Oregon.

Q. And how long were you at the University of Oregon?

A. I commenced the pre-law career there in 1933, and commenced the Law School in 1936. I received my Bachelor of Arts degree in [62] 1937 and my Bachelor of Laws in 1939.

Q. You were how old, then, when you finished the school?

A. I believe I was twenty-three years when I finished the University of Oregon Law School.

Q. Have you voted in the United States?

A. I have, sir.

Q. Have you ever voted in any other country?

A. No, sir, I have not.

Q. Now, what date do you say you finished the Law School on, Mr. Yasui?

Mr. Burdell: If the Court please, I object to that as incompetent, irrelevant and immaterial.

The Court: Oh, I think it is preliminary. He may answer.

Mr. Bernard: Q. What date did you say you finished the Law School on?

A. In June of 1939.

Q. And when did you go to work for this office of the Consul General in Chicago?

A. The following year, in April, 1940.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. And what did you do in the meantime?

A. Well, pending the results of the bar examination I helped as a ranch hand on my father's farm. In approximately September we heard the results, and having completed the bar I attempted to practice law both in Hood River and, for a short while, in Portland, Oregon. [63]

Q. Now, I wish you would tell the Court how you secured this position in Chicago.

A. To the best of my knowledge, the Japanese Consulate at Chicago was elevated a Consulate General in 1940. There was a need for an enlarged staff at that time. The Consul General newly appointed had been a former Consul here at Portland. There was a letter written by my father to the Consul General stating that I had graduated in law school and that he believed that I would be fit for such a position. I secured letters of recommendation from Dean Wayne L. Morse, of the Oregon Law School, as I recall it a certificate from the Registrar at the University of Oregon, and also various letters of recommendation from people in Hood River and in Portland. Because there was a need for a man who could speak English as well as Japanese and, I suppose also because of some of the records that I had while I attended the University of Oregon, I was selected for that position.

Q. And when did you go to Chicago?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. As I recall, I arrived in Chicago on April 1st, 1940.

Q. Were you required at that time to take any oath of allegiance?

A. I was not required—

Mr. Burdell: (Interrupting) Objected to, your Honor, as incompetent, irrelevant and immaterial.

The Court: Well, I am not sure that it is incompetent, if he took an oath of allegiance after he arrived at the age of majority. [64]

Mr. Burdell: Well, your Honor, the indictment in this case charges a violation of Public 503, which declares, your Honor, any act in violation of any of the orders issued by the Commanding General of the Western Defense Command, and the defendant is charged with violating Public Proclamation No. 3, which provides that all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 shall observe certain conduct. It is not limited to alien Japanese.

The Court: I know it is not, and that is what makes me doubt its constitutionality; therefore, I hold that the proof is competent to establish whether there be citizenship, notwithstanding that your indictment did not allege that this man was a citizen, therefore, that is the point, I think, in this case, and that is the point that I have asked these gentlemen to be present here as friends of the Court to determine whether or not that is constitutional.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Burdell: Yes. Does your Honor care to hear argument at this time?

The Court: No, I don't care to have any argument on it right now, because I want to proceed with proof on the subject.

Mr. Burdell: Very well, your Honor.

The Court: And I want to hear proof on both sides, if the question is going to be raised. Proceed.

Mr. Bernard: Would you read the witness the question, Mr. Rauch. [65]

(The question referred to was thereupon read, as follows:

“Were you required at that time to take any oath of allegiance?”)

A. I was not required to take any oath of allegiance when I began my employment with the Consulate General in Chicago.

Q. Or were you required to take any oath of allegiance at any time during your employment?

A. No, sir, I was not so required.

Q. And did you, whether you were required or not, take any oath of allegiance at any time from the commencement to the end of your service there in Chicago?

A. No, sir, I did not.

Q. Now, will you please state to the Court your duties in that position and what you did.

A. I was employed as a general secretary in charge of the correspondence. There was an American fellow by the name of Bob Murphy and

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

myself that handled like duties. We received the morning mail, submitted them to the Consul General, and the Consul General would submit one of the letters to either Murphy or myself to answer, the reason being that, because of our facility with the English language, we could phrase the letter better than the Consul himself. As soon as these letters were drafted we submitted them to him for approval, and if approved we typed them out and sent them out. Also in connection with our duties [66] on various occasions the Rotary Clubs and various civic organizations would call upon the Consul to send a man to explain the position of Japan in the Far East, or perhaps some club or organization would want to know about flower arrangement. I acted as research on such matters and upon such occasions I did go to such civic meetings or ladies' meetings to make such speeches.

Q. You have mentioned Bob Murphy who was doing work similar to yours. Was he an American?

A. Yes, he was a Caucasian American, born, I believe, in Nebraska.

Q. And were there any other white employees?

A. Yes, there was Frances McDougall, who was a naturalized American, who was the typist for the office.

Q. Now, did the nature of your employment change at all during the time that you were there?

A. No, not particularly. The only possible

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

change was that the Consul General himself was recalled in 1941, September I believe the month was, and since that time I acted under the Acting Consul General. That was the only nature of the change.

Q. I believe one of the witnesses testified that you said up in Missoula that you were first a secretary and then a sort of public relations man.

A. Yes, I believe that statement was made.

Q. Well, what about that, Mr. Yasui?

A. Well, as I recall my testimony at Fort Missoula, no such [67] statement was made that I was ever a public relations man. However, I did testify, as I do now, that I did make certain speeches there, if that be so construed as public relations.

Q. And did you make speeches with regard to Japan's position in the war with China?

A. Yes, I did, sir.

Q. Were those speeches that you refer to before public bodies? A. Yes, sir, it was.

Q. I mean clubs, and things of that kind?

A. Yes, sir, like Rotary, I believe.

Q. By the way, what was your salary while you were working there?

A. My salary was one hundred twenty-five dollars per month.

Q. When did you first hear of the attack on Pearl Harbor? A. On December 7, 1941.

Q. When did you resign your position?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. As I recall, on the 8th day of December, 1941.

Q. Did you sever your entire connection with them at that time? A. I did, sir.

Q. And why did you resign?

A. Because I felt that as a loyal American citizen I could not be working for the Japanese Consulate after the declaration of war.

Q. Did you receive any advice on that from anybody?

A. No advice that prompted me to so act, except possibly a telegram from my father, that wired me that now that this country——

Mr. Bernard: (Interrupting) You can't state the contents of it. [68] I would like this wire marked for identification.

(Telegram bearing date December 8, 1941, M. Yasui to Minoru Yasui, so produced, was thereupon marked for identification as Defendant's Exhibit 11.)

Mr. Bernard: Will you hand that to the witness, and ask him if he identifies that as a wire he received from his father.

A. Yes, this is the wire that I received from my father.

Mr. Bernard: I would like to offer the wire in evidence.

Mr. Burdell: The only objection is that it is

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

immaterial. We do object on that ground. The further objection that it is hearsay and self-serving.

The Court: The Court has ruled that it is pertinent to show this defendant is an American citizen or not. That depends on the question of his intention. The intention may be shown by a great many acts or declarations, and the objection that this is self-serving goes simply to the question of weight rather than admissibility. I think it may throw some light on his intention and is admitted.

(The telegram referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 11.)

Mr. Bernard: This is a telegram dated December 8th, 1:00 A. M., Hood River, Oregon. "Minoru Yasui, 306 Dearborn Plaza, 1032 North Dearborn Street, Chicago. As war has started your [69] country needs your service as a United States reserve officer. I as your father strongly urge you to respond to the call immediately. M. Yasui."

Q. What did you do about offering your services to your country, Mr. Yasui?

A. Before that——

The Court: (Interrupting) Just a moment. I think that is objectionable.

Mr. Bernard: Well, I don't know what your Honor has in mind. I am offering it also as to his intentions.

The Court: You may ask him what he did

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

toward offering his services to Japan or the United States, whichever you wish.

Mr. Bernard: All right, I will confine it to the United States. Did you do anything towards offering your services to Japan? A. I did not.

Q. All right, what did you do towards offering your services to the United States?

A. I immediately wired Headquarters, Second Military Area, at Portland, Oregon, offering my immediate services.

Mr. Bernard: I would like to have this marked for identification.

(Letter, bearing date December 8, 1941, addressed to 2nd Lt. Minoru Yasui, signed "E. P. Curtis, Major, A. G. D., Asst. Adj. Gen.", so produced, [70] was thereupon marked for identification as Defendant's Exhibit 12.)

Mr. Bernard: Q. I will ask you to examine the document which has just been marked for identification and tell me what that is?

A. Yes, this is the letter that I received in answer to the telegram that I sent on December 8th.

Mr. Bernard: We will offer the document in evidence.

Mr. Burdell: We feel that it is immaterial, your Honor.

The Court: Let me see it. The Government has introduced evidence of this man's statements that

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

he was a reserve officer, and this would confirm that. It is therefore received.

(The letter referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 12.)

Mr. Bernard: (Reading)

“Headquarters Second Military Area

“225 U. S. Court House

“Portland, Oregon

“201-Yasui, Minoru

EPC/f

“2nd Lt., Inf-Res.

December 8, 1941

“Subject: Extended Active Duty

“To: 2nd Lt. Minoru Yasui, Inf-Res.

1032 N. Dearborn Street

Chicago, Illinois

“1. Receipt of your telegram of December 8, 1941, is [71] acknowledged. Your tender of service is appreciated and has been made of record at this headquarters.

“2. No change in the present War Department policy of ordering officers to active duty to fill existing vacancies has been made. When your name is reached on our priority list for active duty, you will be contacted by this headquarters. In the mean-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

time, it is suggested that you hold yourself in readiness for an early call to active duty.

“By command of Major General Benedict:

“E. P. CURTIS

“Major, A. G. D.

“Asst. Adj. Gen.”

Mr. Bernard: I hand you what purports to be a telegram, dated December 11th,—and ask first that that be marked for identification.

(Telegram, bearing date December 11, 1941, E. P. Curtis, Assistant Adjutant General, to “2nd Lt. M. Yasui, Inf. Res., 1032 North Dearborn Street”, so produced, was thereupon marked for identification as Defendant’s Exhibit 13.)

Mr. Bernard: Q. I ask you to examine it and state what that is?

A. This is a telegram in answer to the second telegram that I had written to the Second Headquarters.

Q. I see. You had sent a second telegram after the one you have previously referred to? [72]

A. Yes, sir, I had.

Mr. Bernard: We will offer in evidence the telegram identified by the witness.

Mr. Burdell: No objection.

The Court: Admitted.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

(The telegram referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 13.)

Mr. Bernard: (Reading) "December 11, 7:15 P. M. 2nd Lt. M Yasui, Inf Res. 1032 North Dearborn St. Reurtel effective date or details regarding your active duty not yet determined stop await further instructions. E. P. Curtis Asst Adj Gen."

Q. Did you communicate further with the War Department after that?

A. No, not directly from Chicago, to the best of my knowledge.

Mr. Bernard: I will hand you a letter dated March 28, 1942, and ask you—first, I will ask that it be marked for identification.

(Letter, bearing date March 28, 1942, addressed to "2nd Lt. Minoru Yasui, Inf-Res., 704 12th Street, Hood River, Ore.", signed "W. R. Martin, Captain, A. G. D., Asst. Adj. Gen.", so produced, was thereupon marked for identification as Defendant's Exhibit 14.)

Mr. Bernard: Q. The letter now having been marked for identi- [73] fication, I will ask you to examine it and state what that is?

A. This is a letter from the Second Military Area Headquarters that I received here in Portland after I had returned from Chicago, stating my status here in the Reserve Officer Corps.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Bernard: We will offer in evidence the letter identified by the witness.

Mr. Burdell: No objection.

The Court: Admitted.

(The letter referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 14.)

Mr. Bernard: This says:

“Headquarters Second Military Area
225 U. S. Court House
Portland, Oregon

“201-Yasui, Minoru, hjs/vjm
“2nd Lt., Inf-Res. March 28, 1942.

“Subject: Status.

“To: “2nd Lt. Minoru Yasui, Inf-Res.
704-12th Street,
Hood River, Ore.

“The following War Department letter, file and subject as above, dated March 19, 1942, forwarded by 1st indorsement, Hq. Ninth Corps Area, dated March 23, 1942, is quoted for your information and guidance:

“1. Reference is made to your first wrapper indorsement of February 25, 1942, forwarding report of physical examination [74] dated January 19, 1942, of Second Lieutenant Minoru Yasui, In-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

fantry Reserve, (O-360897). The physical defect, defective vision, 8/200 right, is noted.

“2. Waiver of the above noted defect is authorized for limited service under the provisions of letter, this office dated January 7, 1942, file AG 210.31 (12-19-41) RP-A, subject: ‘Waiving of physical defects for limited service officers of the supply arms and services.’

“3. Lieutenant Yasui will be retained in the Infantry Reserve with eligibility for limited service only.

“By command of Major General Benedict:

“W. R. MARTIN,

“Captain, A. G. D.,

“Asst. Adj. Gen.”

Q. Have you ever been called to active service, Mr. Yasui?

A. No, sir, I have not been called to active service.

Q. And have you ever withdrawn your request to be assigned to active service?

A. No, sir, I have never withdrawn such request.

Q. And are you willing to go in active service at any time? A. I am, sir.

Q. Now, I notice that that letter is addressed to Hood River, in March, and the others have been to Chicago. When did you return to the West?

A. I returned to Portland on July 12, 1942.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. On when? [75]

A. July—January 12, 1942.

Q. And, with reference to that, when did you go up to the FBI office?

A. On the afternoon of my arrival here in Portland, Oregon.

Q. And what was your purpose in going to the FBI office?

A. I had several conversations with Mr. Splendor, who is the Special Agent of the Federal Bureau of Investigation at Chicago, and he had suggested that it would be a very wise thing for me to keep in touch with the Federal Bureau of Investigation agents and inform them of my removal from Chicago to the West Coast area.

Q. And it was for that reason that you went up there?

A. And incidentally to inquire about my father, whom I had not seen for the last two years.

Q. Now, you had a conversation with Mr. Mize, at which I believe Mr. Davis also was present at least during a part of the conversation. I don't know as there is very much difference between you as to what happened, but I wish you would state your version of that conversation.

A. In general, the conversation as reported by Mr. Mize is correct. We did discuss our school days, and then we went into whether or not the Army at the present time in moving the Japanese-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

American citizens along with the enemy aliens was justified or not. Ray Mize posed the question that if I were the Commander in Chief of the Western Defense Area, knowing [76] that an imminent invasion was possible, how would I be absolutely sure that the security of this country would not be in danger. Well, the only logical answer would be to intern the Japanese. However, I asked the academic question, if Mize himself was God almighty how would he prevent wars, to be absolutely sure to prevent wars. Mize answered that he would destroy the people. Of course, that is the extreme view, but we did converse along those lines.

Q. Well, at that time do you know whether there had been any orders removing the American citizens?

A. At that time there was no such order.

Q. And this was a sort of an academic discussion?

A. It was a hypothetical question at the time, yes, sir.

Q. I believe Mr. Mize also said that you were sorry that you had taken the action that you had. I believe that was in a later conversation you had with him.

A. No, I believe that statement had been made at the time. The question was whether I believed any repercussions would happen from my testing the constitutionality of the curfew act, and I be-

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

lieved that possibly there would be repercussions that would be harmful to the Japanese colony.

Q. I was in error. Your conversation with Ray Mize was on April 3rd, I believe, and the one with Mr. Quinn was on January 12th.

A. As I recall, it was on March 30th. [77]

Q. Your recollection was that it was March 30th? A. Yes, sir.

Q. And what did you have in mind when you made that last statement?

A. Well, there is always a possibility of more stringent regulations being imposed, and, secondly, the public resentment against any one, possibly, testing the constitutionality of an Army order.

Q. Now, Dr. Everson and Mr. Scott testified as to your testimony up there at Missoula. You did appear at the time of your father's hearing before the Alien Board, did you? A. I did, sir.

Q. And what is your recollection as to what you told them about your activities?

A. Well, substantially, the testimony of Dr. Everson and Mr. Scott is correct. I did testify that I was employed at the Consulate General; I told them something of my family background and my education and what I did there in Chicago; also stated the fact that I was a reserve officer, and answered questions in general from the members of the Board.

Q. What is your recollection as to whether or

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

not you mentioned up there the fact that you had gotten letters of recommendation from Dr. Wayne Morse and others?

A. I didn't hear the question, sir.

Q. What is your recollection as to whether you told the Board that [78] you had also got letters of recommendation from Dean Morse and others?

A. I believe the statement was made that I did receive recommendations from the various deans and officials at the University of Oregon.

Q. Now, one of the witnesses, I believe Dr. Everson, also said that you said you later became public relations man on behalf of the Consul and that you made speeches which the Consul usually looked over and approved before you delivered them.

A. The testimony at the time of the hearing was brought out that I had no discretion in picking the exact subject or in picking the wording of the speeches.

Q. Well, was it a fact that these speeches were approved by the Consul General before——

A. (Interrupting) That is correct, sir.

Q. I see; and you so told the Board?

A. Yes, I did.

Q. Mr. Everson also mentioned that something was said by you about making speeches at Kankakee, some such place as that. Do you recall that place?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. To the best of my knowledge, I have never been to Kankakee.

Q. Now, have you ever obtained or attempted to obtain naturalization in any foreign state whatsoever? A. No, sir, I have not.

Q. Have you ever taken an oath or made an affirmation or other [79] declaration of allegiance to a foreign state?

A. No, sir, I haven't made any such affirmation or oath.

Q. Have you ever entered into or served in the armed forces of a foreign state?

A. No, sir, I have not.

Q. Or have you ever offered so to do?

A. No, sir, I have not.

Q. Have you ever accepted or performed the duties of any office, post or employment under the government of a foreign state which only nationals of such state are eligible to perform?

A. No, sir, I have not.

Q. Have you ever voted in a political election in a foreign state? A. No, sir.

Q. Or participated in an election or plebiscite in determining the sovereignty over a foreign state? A. No, sir.

Q. Have you ever made a formal renunciation of nationality before a diplomatic or consular agent of the United States in a foreign state?

A. No, sir, I have not.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Or have you made any renunciation of any kind of citizenship in the United States?

A. No, sir, I have never renounced American citizenship.

Q. Have you ever deserted the military or naval services of the [80] United States?

A. No, sir, I have not.

Q. In time of war or otherwise?

A. No, sir.

Q. Have you ever committed any act of treason or attempting by force to overthrow or bear arms against the United States?

A. No, sir.

Q. Or have you ever been convicted of any such offense?

A. No, sir.

Q. By a court martial or by a court of the civil jurisdiction?

A. No, sir, I have not.

Q. And, as far as you know, have you ever, either intentionally or unintentionally, done any act to renounce citizenship in the United States of America?

A. To the best of my knowledge, I have never renounced my American citizenship.

Q. Or have you ever had any intention of so doing?

A. I have had no such intention.

Mr. Bernard: I think, your Honor, that is about all of it. If you are going to have a recess, I would like to check my notes.

The Court: The Court will take a recess.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

(A short recess was thereupon had, after which proceedings were resumed as follows:)

The Court: Are you ready, Mr. Bernard? Are you ready to go ahead? [81]

Mr. Bernard: Yes.

Q. Mr. Yasui, I forgot to ask you whether or not you have ever taken an oath of allegiance to the United States of America?

A. Yes, I have taken an oath of allegiance to the United States of America in December, 1937, upon the completion of my R.O.T.C. course from the University of Oregon. It was necessarily postponed to December because I had not reached my majority until October.

Q. You completed it in October, but you had to wait until you were of age to take the oath?

A. I completed it in June.

Q. Now, at the time of your arrest on this charge what were you doing?

A. At the time of my arrest?

Q. Yes. I don't mean at the exact moment. I understand you were waiting to go into the Army, but were you doing any work in the meantime?

A. I was working here, employing myself as an attorney at law, in the practice of law, in Portland?

Q. And you were in actual practice at the time?

A. I was, sir.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Now, you have related your employment with the Consul General's office in Chicago. I will ask you whether you have had any employment or connection in any way, directly or indirectly, with the Japanese government except in that employment? [82]

A. No, sir, I have had no such other connection.

Q. Where are you residing now?

A. At the present time I am at the W.C.C.A. Assembly Center at North Portland, Oregon.

Q. That is where the Japanese are now being detained for twenty-four hours a day?

A. That is correct, sir.

Q. And do you know where your father's residence is?

A. I understand it to be at Camp Livingston, Louisiana.

Q. And where is your mother?

A. I believe in Pineville, California.

Q. Have you got some sisters?

A. Yes, sir, one sister, I believe now is in Denver, Colorado.

Q. She was younger than you?

A. Yes, sir. She just graduated at the University of Oregon.

Mr. Bernard: I think you may cross-examine.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Cross-Examination

By Mr. Donagh:

Q. When did you graduate at the University of Oregon?

A. I graduated at the University of Oregon proper in 1937.

Q. And were admitted to the bar that year?

A. No, sir; then I was in the University of Oregon Law School and graduated in 1939.

Q. And when did you start to work for the Japanese Consul General in Chicago? [83]

A. During April, 1940, the year following my graduation.

Q. I see; and in the meantime I believe you said you had practiced law at Hood River?

A. For a short time.

Q. Do you speak Japanese? A. I do, sir.

Q. And where did you learn to speak Japanese?

A. I learned it from my parents.

Q. Do you speak Japanese in your home?

A. To a certain degree, yes, sir.

Q. Have you spoken Japanese for a good many years? A. Ever since I can recall.

Q. Ever go to a Japanese language school or Japanese school of any kind?

A. Yes, sir, for three years.

Q. Whereabouts was that?

A. At Hood River, Oregon.

Q. Whereabouts?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. At Hood River, Oregon?

Q. At Hood River, Oregon. What was the name of that school?

A. I think they called it the Japanese language school.

Q. Japanese language school? A. Yes, sir.

Q. Is that a school where other Japanese young men and young women attended? [84]

A. Yes, sir.

Q. All Japanese students? A. Yes, sir.

Q. What was the practice up there in regard to Japanese children attending the school?

A. Well, there was a session of reading and then a session of writing, and then we reviewed what we had done in the mornings in the afternoons and Saturdays, and, well, it was just done in an attempt to teach us to read and write the Japanese language. It is very difficult and takes considerable study to master it.

Q. Was it attended pretty generally by the sons and daughters of Japanese families in Hood River?

A. Yes, fairly.

Q. Do you recall what years you attended?

A. Not exactly, no, but I was attending grammar school at the time. Probably, oh, about prior to 1930, about '26, '27, on up to about 1930. I don't recall exactly the years.

Q. Did you go to any other Japanese school except that one? A. No, sir, I did not.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Did you have any Japanese societies or organizations which you attended in Hood River or elsewhere?

A. By Japanese societies what do you mean?

Q. Organizations or associations of Japanese people?

A. There is the Japanese Methodist church, of which my father [85] and mother are members, that I attended on Sundays; and the Japanese-American citizens League, composed of American citizens of Japanese ancestry; and that is about all the Japanese organizations that I have attended.

Q. Ever belong to any Japanese fencing clubs?

A. No, sir.

Q. Or riding clubs of any kind?

A. No, sir.

Q. Are you a member of the Methodist church?

A. I am, sir.

Q. You say you are? A. Yes, sir.

Q. Have you ever been a member of any other church? A. No, sir, I have not.

Q. In the Japanese language school what language is used there?

A. Both English and Japanese.

Q. Both English and Japanese; but you went there to learn and become proficient in Japanese, is that it?

A. To attempt to become proficient, yes.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Is there a Japanese farmers' association in your community, your home community?

A. No, I think not, not in Hood River.

Q. You never belonged to it yourself?

A. I was too young at the time.

Q. And have never joined it since, since you have become older? [86]

A. No, sir.

Q. How long after you went to work for the Japanese Consul General did you register with the Secretary of State in Washington, D. C.?

A. The registration was taken care of by the office. The Consul General's did that for us as employees. As I recall, even the chauffeur of our office was registered with the Secretary of State.

Q. You had, however, had occasion to work there for a considerable period of time before your registration was filed?

A. Well, to the best of my knowledge, it should have been, if not, filed twice, because I signed two documents, once in '40 and once in '41.

Q. I see. The total period of your employment there was how long?

A. Approximately from April 1st until December 8th,—that is, April 1st of 1940 until December 8th of 1941.

Q. Now, I believe you stated on direct examination that the Japanese Consul General by whom you were employed was the former Japanese Consul in Portland?

A. That is correct.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Did I understand that correctly?

A. That is correct, sir.

Q. And what was his name?

A. His name was Hiroshi Asinu.

Q. And how long ago was he the Japanese Consul here in Portland?

A. I do not recall. I don't remember him directly. [87]

Q. You didn't know him directly?

A. No, sir.

Q. Then your contact with him was through whom? A. My father.

Q. Did your father and the Consul have any close contacts, so far as you know?

A. At what time are you speaking, sir?

Q. I am just asking you. You say your contact with the Japanese Consul General was through your father. A. Yes, sir.

Q. Had your father and the Consul General been associates over a long period of time?

A. Well, as I understand, the Hood River community has about five hundred Japanese, and every Consul here goes up to Hood River about once a year to contact various people, and my father through those contacts had undoubtedly met Mr. Asinu.

Q. And it was through that contact by your father with the Japanese Consul that the letter he wrote soliciting employment for you is what got you your position, is that it?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. As I understand, that together with what I had achieved at the University of Oregon.

Q. Your father has been rather active in the Japanese colony in Hood River, hasn't he?

A. He has been very, very active in advancing the betterment of that community, yes, sir. [88]

Q. Contributed money to the Japanese war fund?

A. As to that I have no knowledge.

Q. Well, isn't it a fact that your father testified in your presence before the Alien Hearing Board that he had contributed money to the Japanese war fund?

Mr. Bernard: We will object to that, your Honor, on the ground that it is an attempt to do indirectly what they could not do directly. This young man would not be bound, under the circumstances there prevailing, by anything that his father said in that hearing.

The Court: No, I don't think it is binding. I will sustain the objection.

Mr. Donagh: Q. Were you present at the ceremony in the Japanese Consul's office in Portland when your father was given a high honor by the Japanese government in 1940?

A. No, sir, I was not.

Q. You are aware of the fact that he received recognition by the Japanese government?

A. For the work that he had done in promoting

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

better relations between the Japanese and Americans in Hood River Valley, yes.

Q. How long ago did you say you returned to Japan?

A. Well, to the best of my recollection, after I returned to this country I became nine years old. That would make it in 1925.

Q. You went over there, then, when you were——

A. Eight and a half, approximately.

Q. Eight and a half. [89]

Q. You returned with your parents, with your father?

A. Yes, sir, my mother and my father went to Japan to visit their parents, or my grandparents.

Q. How long were you there?

A. Approximately three months, during the summer vacation.

Q. Did you go to school or engage in activities of your own there under the guidance of your parents while you were there?

A. No, sir; it was the summer vacation. We just went on a vacation to see the grandparents and to visit.

Q. Did you return there at any time?

A. No, sir.

Q. That is your only trip?

A. That is my only trip.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Now, in regard to your work in Chicago, you had occasion to deliver speeches occasionally at the request of the Consul General?

A. That is correct, sir.

Q. How many of those public appearances would you say you made?

A. Well, I can't recall the exact number, but during the eighteen or twenty months I was there approximately once a month.

Q. And where would you receive your directions to deliver a speech at a certain time?

A. From the Consul General.

Q. From the Consul General?

A. Or the Acting Consul General.

Q. And I believe you testified a moment ago that you prepared [90] these talks but they were approved by the Consul General?

A. Yes, sir, the procedure was that he would suggest a particular topic and talk over the general outline of the speech, which I would put into English, submit it to him for approval, and if approved then I gave the speech itself.

Q. But you said that you had no discretion in what you did, is that it?

A. That is, I was under the direct supervision of the Consul General.

Q. In other words, you did and said what the Consul General wanted you to do?

A. Virtually, yes, sir.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. Well, now, when you went to work for the Japanese government, through the Japanese Consul General, you were aware, were you not, that conditions between Japan and the United States over a period of a number of years had caused considerable comment and difficulty in the exchange of messages, indicating the possibility of strained relations between this country and Japan? You knew of that, did you not? A. Yes, I did.

Q. Did you not know that even as far back as 1927—or '37, rather, that an American gunboat and American sailors had been fired on by the Japanese, and that that and a series of companion acts in China, in the International Settlement, where American citizens were involved, had caused a strained conditions between [91] those two countries?

A. Yes, I understood all those things and it was my purpose when I worked for the Consul General of Japan possibly to work for a better relationship. The letter from Dean Wayne L. Morse particularly pointed out that a person born in this country of Japanese parents might contribute not only to the peace of this country but the peace of the world by attempting to explain the position of Japan, to bring out economic conditions. It proved subsequently that we were wrong.

Q. But you testify that you had no discretion

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

in what you did, that you did what you were told to do by the Japanese Consul?

A. That is correct.

Q. And did not exercise your opinions as an American citizen, but did what the agent of the Japanese government asked you to do and said what he asked you to say?

A. That is correct, to bring out what the Japanese government has to say to the attention of the American people, to express it so it could be understood.

Q. And well knowing that the attitude of this Government and the American people was contrary to the policy of Japan that you were defending, speaking about?

A. Because, as I said before, I thought it was my contribution to the preservation of peace. As I admitted before, we were wrong, but that was my sincere purpose in working for the Consulate General of Japan. [92]

Q. When you spoke to Special Agent Mize and Special Agent Davis of the FBI and made the comment which has been referred to here and which I believe you testified to on direct examination, that under certain conditions the Japanese on the Pacific Coast should be interned, did you make any distinction in that between aliens and Japanese-Americans? What was your attitude that you expressed to Mr. Mize and Mr. Davis?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. At that time the hypothetical question arose, how would we be absolutely sure, how would we absolutely protect the security of this country, in case of an invasion by Japan? In answer to a hypothetical question like that, of course, the obvious answer would be either to destroy or to intern all the Japanese and Japanese Americans, that is the only absolutely sure way, but that is purely a theoretical question.

Q. That is true; but your answer to the question was the internment of the Japanese, Japanese aliens or Japanese-Americans; that was the answer you gave them? In answer to the question, that is what you gave as your opinion?

A. That is correct, yes, as far as theory and logic is concerned.

Q. Now, you have indicated that you have had some regret by reason of possible repercussions by what you have done concerning your violation of the curfew hour. Has some resentment come to you on the part of Japanese in that connection?

A. No, sir, there has been no resentment. The only reason I feel that perhaps it is too bad is to be opposing something that the [93] Government does, because I feel that this is my government too, and it is then too bad to have to oppose the orders of our constituted authorities, but I feel in this particular case that it must be done.

Q. And have you had discussion with other

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Japanese out at the Assembly Center in North Portland on your action? A. Very few.

Q. What is the attitude of the people out there?

Mr. Bernard: I don't think that is material, your Honor. We object to it.

The Court: The objection is sustained.

Mr. Donaugh: Q. As a matter of fact, you have had very little discussion with Japanese out at the Center, have you?

Mr. Bernard: I object to that, also.

The Court: The objection is sustained.

Mr. Donaugh: Q. How many times have you contacted by telegram or letter officials of the Army concerning going into the service since you have returned to Oregon?

A. Since I have returned to Oregon?

Q. Yes.

A. On December 19th I was requested to report for active—for a physical examination. On the 19th I was at Vancouver. Subsequent to that I called at the office of—I don't recall the exact date, but sometime in January—to see if any list had been compiled whereby I would have to go into immediate [94] active service. At that time they could not inform me. I think I notified them of my change in address from Chicago to Hood River, Oregon, and that, I think, is about the sum of my contact with the Second Military Headquarters.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Q. But you have not been called for active service, have you? A. No, sir, I have not.

Q. You testified, as I recall, on direct examination to certain other employees employed in the Japanese Consul General's office in Chicago. How many employees were in that office, in round numbers?

A. In March, or, rather, April of 1940 there were approximately ten? Q. Sir?

A. Approximately ten in 1940.

Q. Approximately ten; and of those you and, I believe, the young lady you spoke of——

A. (Interrupting) Yes, sir.

Q. (Continuing) ——were the American citizens in the office?

A. No, sir, there were four American citizens.

Q. Four American citizens. Isn't it a fact that speeches that you delivered there were in justification and defense of the Japanese war policy?

A. Rather than that, it was an attempt to show the economic differences that existed between China and Japan, to try to point out whereby those differences could be resolved. I have [95] never advocated war between Japan and the Chinese. As a matter of fact, I don't think any responsible Japanese ever has. Those are some of the speeches that I did make. On the other hand, I did make speeches before the University of Chicago, some group there, concerning the flower arrangements,——

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Mr. Bernard: (Interrupting) A little louder. I didn't hear you.

A. (Continuing) —Down at Brent House, concerning the history of the Japanese Empire. Various speeches of that nature I did make, yes.

Mr. Donaugh: Q. Now, during the course of your employment there, acting under the direction of the Japanese Consul General, Japan and China were continuously at war. It wasn't a question of you or anyone else advocating war on Japan. War existed. Now, isn't it a fact that your talks and the subjects of your talks were in justification of the Japanese war and attacks on China?

A. Well, practically, there was a war existing. In legal theory no war existed. However, the point that I was bringing out, that probably the differences between China and Japan could be resolved without resort to arms. I have never condoned the military activities of Japan, but attempted to bring about an understanding to the American people that perhaps there is some economic basis for such a war.

Mr. Donaugh: I believe that is all. [96]

Redirect Examination

By Mr. Bernard:

Q. Just one or two questions, Mr. Yasui. About your registration in Washington, D. C.,—do you know whether the other employees at the office were also registered?

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. Well, according to the Consul General, yes, they were. The Consulate General staff took care of our registration for us.

Q. And was your registration taken care of by the Consul General?

A. That is correct, sir. We signed the documents and they were sent in by—I believe submitted by the Embassy at Washington.

Q. This Japanese school, did you attend that while you were also attending the American schools, public schools? A. Yes, sir, I did.

Q. When would you attend the Japanese schools?

A. Generally we would attend Friday afternoon after the American schools, and then on Saturday mornings.

Q. Now, he asked if your father hadn't been active in the Japanese colony there. Do you know whether your father was very active among the white people in Hood River?

A. He was very active among the white people, yes, sir.

Q. In what connection?

A. He was a member of the Rotary Club. He was also a Director of the Apple Growers' Association, which is the biggest fruit cooperative in that particular region. He also attempted to bring about a better feeling among that community. As you [97] recall, in Hood River there was quite a

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

bit of anti-Japanese feeling earlier, approximately in 1906 and thereabouts. Well, through the efforts of my father and the efforts of people like him the community there settled down to a normal, peaceable community, whereby the Japanese and the American farmers cooperated together in marketing their products and bringing themselves mutual return.

Q. Now, you have testified that you made speeches and took your orders from the Consul General. I will ask you whether or not you were ever asked—strike out “asked”—whether you ever made a speech or did anything which you considered detrimental to the United States of America?

A. No, sir, I have never done such a thing. I couldn't have done such a thing.

Q. And were you ever asked so to do while you were there employed?

A. No, sir, I was not.

Mr. Bernard: I think that is all.

The Court: Just a moment.

Mr. Bernard: I think, to complete the record, your Honor, during the cross-examination of one of the Government's witnesses I had identified the card which we showed the witness, and I will ask that that be introduced in evidence. I think it is Exhibit Number 2.

Mr. Donagh: Exhibit Number 1.

Mr. Bernad: Exhibit Number 1. [98]

The Court: Admitted in evidence.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

(The card referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 1.)

The Court: Are you through?

Mr. Bernard: Yes, I am.

Recross Examination

By Mr. Donagh:

Q. Just one question: Isn't it a matter of fact that there has been considerable anti-Japanese feeling in Hood River since December 7th?

A. As to that I am in no position to answer, because I have not been continuously a resident of Hood River since December 7th. I arrived in Portland on January 12th, 1942, returned home probably for two or three days, and for the most part I was here in Portland practicing law, so I don't know definitely the position of the American public in Hood River.

Q. As a matter of fact, you have spent considerable time at Hood River, haven't you, since you returned to Portland—since you returned to Oregon?

A. Considerable time? By that you mean how long?

Q. I mean ample time for you to have the opportunity of knowing Japanese sentiment on the part of Americans or anyone else.

A. I know that the people that understand the

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Japanese-Americans, [99] who know that they are good American people, have always said that they would expect us to do our part. My brother was the chairman of the bond drive to buy Liberty—or Defense Bonds and Stamps. They have the confidence of the people, in my opinion.

Mr. Donaugh: That is all.

Mr. Bernard: That is all.

The Court: May I——

Mr. Bernard: Yes.

The Court: Just a moment. I am going to submit this to you, Mr. Bernard: I should like to ask some questions, but I will not insist upon it over objections.

Mr. Bernard: Well, under the peculiar facts of this case, I will be glad to have the witness answer any question your Honor wants to ask him. I would prefer it that way, and I know he would.

The Court: Do you know of one Matsuoko?

A. Yes, sir.

The Court: Who was he?

A. He was an ex-Foreign Minister of Japan.

The Court: And a graduate of the University of Oregon?

A. That is correct, as I understand, sir.

The Court: Do you know him personally?

A. No, sir, I do not.

The Court: You have read, during these years and since you [100] became associated with the

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Consulate General of Japan in Chicago, concerning the attitude that he has taken regarding American-Japanese relations?

A. Well, I have heard a great number of stories, and I haven't believed some of them. Some of them I have believed, yes.

The Court: A good deal of publicity has been given to his views.

A. Yes, sir, there have.

The Court: And are they not definitely anti-American?

A. Well, I believe it is hard to so believe whether he is actually anti-American. I think that he is more pro-Japanese than anti-American.

The Court: You say you don't know him personally?

A. No, sir, I do not. You see, he graduated——

The Court: (Interrupting) Did your father know him?

A. I doubt it.

The Court: You knew of those utterances, however, before you accepted this position, did you?

A. Yes, sir, I did.

The Court: What is Shinto?

A. Shinto? As I understand, Shinto is the national religion of Japan.

The Court: Do you give adherence to its precepts?

A. My father and mother were Methodists in

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Japan, and I myself have been a Methodist in this country and I don't know the [101] precepts of the Shinto religion.

The Court: Was not Shinto practiced in your household?

A. No, sir.

The Court: By your father and mother?

A. It was not, no, sir.

The Court: That includes some of the phases of ancestor worship, does it not? You know enough about it to know that.

A. Yes, if I understand it, that is so.

The Court: Does the Emperor of Japan have a religious capacity?

A. Well, I am not really versed enough to state definitely, but I understand that he has, yes.

The Court: And do you give adherence to that belief?

A. I do not. To me he is a human being.

The Court: And you do not accept divine pretensions on the part of the Emperor of Japan?

A. No, sir, I do not.

The Court: Nor the belief of the Japanese people to that effect?

A. No, sir, I do not.

The Court: Were offerings ever made in the graveyard or before the grave of any of the people of your family?

A. Offerings? Floral offerings, yes, on Memorial Day and on Sundays.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

The Court: Were there not food offerings placed?

A. There were no food offerings placed. Both my father and mother [102] are good, devout Methodists. They are really Christians.

The Court: Do you believe in the sanctity of an oath?

A. I do, sir.

The Court: As administered in this court?

A. I do, sir.

The Court: Have you accepted an oath of allegiance to the United States?

A. I did.

The Court: And on that occasion did you accept some other obligations?

A. To preserve and defend the Constitution of the United States, yes.

The Court: And—Do you remember the rest of that oath?

A. No, sir, I do not.

The Court: And to obey—do you remember that part of it—to obey the orders——

A. (Interrupting) - Yes, sir.

The Court: Under certain circumstances?

A. Yes, sir.

The Court: Can you repeat that part of it?

A. I cannot repeat it.

The Court: Do you know the substance of it?

A. In substance it is to obey the commands of

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

the commanding officer upon proper authority in time of active service, or something to that effect. [103]

The Court: Do you remember anything about the President of the United States, the orders of the President of the United States?

A. Vaguely, yes, sir.

The Court: You still hold a commission as a reserve officer in the Army of the United States?

A. I do.

The Court: Do you still think that is in effect?

A. I believe so.

The Court: You haven't resigned it?

A. No, sir.

The Court: So far as you know, it has not been cancelled?

A. So far as I know, it has not been cancelled.

The Court: Is there any obligation on you, under those circumstances, to obey an order of the Commanding General of the Western Command or of the President of the United States as Commander-in-Chief of the Armies of the United States?

A. Yes, I believe that there is a certain obligation as an American citizen to respect the Constitution of the United States.

The Court: I am not speaking of your obligation as an American citizen. I am speaking of your obligation as a reserve officer in the Army of the United States.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

A. At the time of my active commission, active service, I will obey any command or order of my commanding officer.

The Court: You don't think that your oath you have taken [104] in accepting a reserve commission doesn't require you to obey any order of the Commander-in-Chief of the Armies of the United States until he calls you to active service?

A. As a private citizen——

The Court: I am not talking about your obligation as a private citizen. I am talking about your obligation as a reserve officer of the United States Army.

A. Well, as a reserve officer, yes.

The Court: What are the obligations?

A. To hold myself in readiness for active service at any time; to obey the Constitution of the United States and the laws of the United States.

The Court: And you thought there was no special obligation on you to obey this particular order?

A. Yes, I took that into consideration, but I feel that, after all, this country is dedicated to the proposition that all men are created equal, that every American citizen has a right to walk up and down the streets as a free man, and I felt that these regulations were not constitutional.

The Court: If as a Second Lieutenant on active duty you had been given the same order by the

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

Commanding General of the Western Department
would you have obeyed it?

A. I would have, sir.

The Court: And what distinction do you make
now?

A. Because I am now, at the present time, a
civilian. [105]

The Court: Notwithstanding you hold a reserve
officer's commission?

A. That is correct, sir.

The Court: And in the event that you were on
active duty would you then think that it was proper
to by indirection disobey such a command by in-
voking other people Japanese people, to test the
constitutionality of this as a law?

A. You say if I were in active service?

The Court: Yes.

A. No, I would not, because at that time, if I
were in active service, I would obey the command
of my commanding officer, wherever he sent me.

The Court: No matter where he sent you?

A. Yes.

The Court: And even though they were not
directly expressed?

A. Yes, sir.

The Court: And yet you think you had no obli-
gation in that regard, because you had not been
ordered to active service?

A. In regard to my personal self, yes, that is
correct.

Exhibit X—(Continued)

(Testimony of Minoru Yasui.)

The Court: Isn't there also a regulation to the effect that no reserve officer of the United States shall leave the American continent of the United States without registering with the War Department, whether on active duty or not?

A. As to that I am not positive. I believe that there is some similar regulation. [106]

The Court: Would you obey that order?

A. I believe I would, sir.

The Court: Why?

A. Because, after all, it pertains to a person on active service, directly so.

The Court: Would you also construe the oath of allegiance to allow you to disobey an order, any order, that is incumbent upon an American citizen?

A. I didn't understand.

The Court: I say, would you also construe the oath of allegiance so that you could disobey an order binding on other American citizens?

A. No, sir, I could not.

The Court: I think that is the extent of my examination. Do you have any further questions?

(Witness excused.)

Mr. Bernard: The defendant will rest his case, your Honor.

(Defendant rests.) [107]

Exhibit X—(Continued)

Rebuttal Testimony.

Mr. Burdell: Mr. Goetze.

GERHARD GOETZE

was thereupon produced as a witness in rebuttal and was examined and testified as follows:

The Clerk: State your name, please.

A. Gerhard Goetze, (spelling) G-e-r-h-a-r-d G-o-e-t-z-e.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Burdell:

Q. Mr. Goetze, is that it? A. Goetze.

Q. What is the nature of your employment, Mr. Goetze?

A. I am Secretary and Business Agent of the Lumber & Sawmill Workers Local 3.

Q. And what is the jurisdiction of that union?

A. All the sawmills that are organized under the Local in the City of Portland.

Q. And the members of the union are engaged in what business, Mr. Goetze?

A. Lumber manufacturing.

Q. Does that union include all laborers in this area who are engaged in working in lumber mills and lumber plants?

A. Some of them are not, there are some of them that are not organized under our Local, but all the larger mills. [108]

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

Q. How many members are there in the union?

A. About twenty-two hundred.

Q. About how many?

A. Twenty two hundred.

Q. Now, Mr. Goetze, acting in your official capacity, have you at any time recently been asked to settle certain disputes which arose among the laborers and their employers concerning the employment of Japanese?

A. Well, there was no dispute between the employers and the working men. The dispute was just amongst the men themselves.

Q. And did you have any part in settling that dispute or carrying on negotiations with respect to it?

Mr. Bernard: I would like to object to this line of interrogation, your Honor, as being wholly immaterial to any issue in this case and as not being proper rebuttal testimony.

The Court: I don't see the purpose of it, Mr. Burdell.

Mr. Burdell: Well, if the Court please, as I understood some of the testimony introduced by the defendant, it seemed to be directed to some showing that the particular order which is here challenged was an unreasonable order, and it seemed to me to be directed toward overcoming the presumption that exists that all legislation and orders passed executed pursuant to the power granted under the Constitution are reasonable. Such a pre-

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

sumption does exist. Now, as I understood the testimony of the defendant, some of it, at least, was directed to a rebuttal of [109] that presumption, and I am attempting to rebut the rebuttal in this manner, by showing that the regulation, that is, Public Proclamation 3, was reasonable.

The Court: What do you say to that?

Mr. Bernard: Well, my position is this, your Honor, that I do not concede that the fact that there have been some labor troubles between white people and Japanese would affect the question one way or the other as to whether or not the Government has a right to discriminate against Japanese citizens entirely because of their race. The obvious answer would be if those Japanese had been engaged in doing anything wrong there were means to prosecute them, and how the fact that there might have been some isolated labor trouble in some locality between Japanese and white people should justify a discrimination against my client, who was not a party to that, solely on the ground of his ancestry, we object to as wholly immaterial to any issue in the case.

Mr. Burdell: If the Court please, in the first place, I can and will show that those disputes such as I am attempting to offer evidence concerning were not isolated, I can show that they were so widespread that they threatened to affect the entire economy of the Northwest, for that matter, the

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

Pacific Coast, that they were so widespread that they threatened to affect the very war production effort. Now, counsel in his statement to the Court just now assumed that this discrimination, or this classification, [110] was based solely on race. I will propose to show, if the Court please, that the classification is not based on race, but in fact is based on certain circumstances, conditions, acts and happenings, that they occurred as a result of the existence of a race differential rather than being based on race in the abstract. In other words, if the Court please, this classification that has been exerted in this case is not a classification based upon race, as it was in the *Buchanan vs. Worley* case, where there was a discrimination between Whites and Blacks; it is not a discrimination based on color alone. The classification in this case, if the Court please, is based on all these many facts, happenings and occurrences that have existed here in the past few months that have arisen as a result of distinction, the race distinction, between Japanese and Americans, not on a race alone, but upon many things that occurred and many acts that may occur as a result of that race discrimination. Now, we propose to show that prior to the time of the issuance of Executive Order 9066, when President Roosevelt vested power in the Commanding General of the Western Defense Command to issue certain regulations regarding the conduct of Japa-

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

nese citizens and aliens, prior to that time there were threats of riot, even, in our vital industries which threatened to affect and destroy and hamper and destroy the entire war economy and the very war effort which is taking place in this vital area at this most critical time, and it was only after the issuance of certain regulations, and only [111] after Lieutenant General DeWitt had declared that he intended to promulgate certain regulations, that the danger and the imminence of these troubles and these disputes and these riots were overcome. My thought is, if the Court please, that this is not a discrimination against the Japanese people any more than it is a discrimination for them. I think that the mere fact, your Honor, that this is only the second, I believe, or possibly the third, case of this sort on the entire Pacific Coast, where there are thousands and thousands of Japanese citizens, evidences the fact that the Japanese people themselves realize that their own safety demands that there be a certain type of regulation, of restriction of this nature, and that is what I propose to show, that their own safety does demand that type of thing,—not only their own safety, but the safety and efficiency of our own war production efforts.

Mr. Bernard: If your Honor pleases this is the first time we ever heard that advocated as an argument for the violation of the due process of law clause of the Constitution, if it is a violation, that

Exhibit X—(Continued)

(Testimony of Gerhard Goetze.)

that violation would be justified because in the opinion of the Government the defendant would be benefited by it. Now, I say this is a regulation based entirely upon color and race; it is so on the very terms. If this regulation had provided that Japanese citizens who had been engaged in any trouble, that he proposes to develop by this witness, or had classified the citizens who had done things that were inimical [112] to the welfare of the Government, that might be one thing, but this regulation proposes to and does in fact apply against Japanese citizens entirely because of their race and not because of anything that any one of them has done, and for that reason we have objected to the testimony.

The Court: I will sustain the objection.

Mr. Burdell: That is all, Mr. Goetze.

(Witness excused.)

Mr. Donough: May it please the Court, I desire to advise your Honor of the availability of a man who is familiar, by reason of long residence and contact, with the Orient, and in particular the Japanese people, a distinguished scholar, educator, who is available to testify as to the result of his contacts and investigations and long years of study of the Japanese, both alien and American-born, with the Japanese as a race of people and their ideals and culture and their type of loyalty, and their type of loyalty under circumstances such as

Exhibit X—(Continued)

the present conditions of war between Japan and the United States. Now, this man is here as an expert, in our opinion, and, in view of the nature of this case, before the Government closes its case I desire to inform the Court of the availability of this man should he have testimony which the Court will wish to hear.

Mr. Bernard: Well, your Honor, if this man has any evidence against my client, of course I can't object to it, but I certainly am going to object to any testimony or dissertation by [113] some man as to his conclusions as to what some of the Japanese might do under certain conditions. In the final analysis, it is not a subject of expert testimony at all, and I would, therefore, object to it unless—if he has any evidence against my client I have no objection to it.

The Court: Well, I think this might have been better used on cross-examination. Since it has not been used, why, I will exclude the general offer. I can't, of course, tell from this general offer what the specific matters are to be proved, and I will say that if it is just general like that, why, I have no interest in hearing it. If you wish to produce this man and ask him some questions, why, put him on the stand and I will rule on the questions as they come up.

Mr. Donaugh: Well, obviously, your Honor, the witness that we would present has no acquaintance whatever with the defendant in this case. His testi-

Exhibit X—(Continued)

mony would deal with the Japanese and their attitude, the basis of race culture, religion, both here in America and in Japan, on the basis of his experience, and it would only be on that basis that we could present him to you, and I only advise the Court of his presence here should his testimony be of interest to your Honor.

The Court: I might say that I have no interest in this matter at all. You call him as a witness, if you want to, and put him on the stand and ask him whatever questions you want to, and if the other side wants to object, why, the Court [114] will rule.

Mr. Donaugh: The Government rests. your Honor.

(Government rests.)

Mr. Bernard: At this time, your Honor, the defendant wishes to interpose a motion for a mandatory verdict or judgment of not guilty in this case, on the ground, first, that the indictment fails to state a charge, inasmuch as it is alleged in the indictment that the defendant was born at Hood River, Oregon, in 1916, and there is a presumption from the fact of birth that citizenship follows.

Second, that the evidence is conclusive and without dispute that defendant since his birth, and particularly at the time alleged in the indictment that these acts were committed, has been and is a citizen of the United States, and as such these regulations are void as to him, for the reason that they deprive

Exhibit X—(Continued)

him of his liberty and his property without due process of law.

Mr. Burdell: If the Court please, I know that your Honor is familiar with the rule that due process of law does not preclude a reasonable classification. I won't burden you with any discussion at length. The Supreme Court in a recent case——

The Court: (Interrupting) I don't want to hear any argument at this moment. I will consider it—Are you going to argue the case?

Mr. Burdell: I could, your Honor. I was about to.

The Court: Well, it is ten minutes to five, and I don't think [115] I will launch into the argument this afternoon. I have these gentlemen whom I have requested to be present, and——

Mr. Burdell: (Interrupting) I would like to take more than ten minutes.

The Court: I assumed so. I would suggest that inasmuch as the question is pretty involved you had better include the other grounds of your motion, and that is that it deprives him of equal protection of the law. That is the other phase of it.

Mr. Bernard: Well, I will. I am glad your Honor called that to my attention. I will add to the motion that, in addition to the ground that the regulations violate the due process of law provisions of the Fifth Amendment, the regulation is a discriminatory in that it applies to Japanese-American citizens, or citizens of Japanese ancestry, and to no

Exhibit X—(Continued)

other citizens, and does not apply to citizens of Italian ancestry or citizens of German ancestry, and that the regulation is discriminatory and deprives the defendant of the equal protection of the laws which he is entitled to enjoy as an American citizen.

The Court: I think that I shall stop the proceedings this evening, and I am willing to hear from everyone as to when we shall argue the case, now. I will be here tomorrow; I will be here part of the time Monday, although I don't know how much of my time will be available then; I will be here again on Thursday for holding of naturalization proceedings, but other than that I will not be back until the following Monday. I am [116] going to Pendleton to try cases there, but I will fly down for the naturalization proceedings on Thursday.

Mr. Bernard: I might state, as far as my own condition is concerned, your Honor, I have had a case carried along in the Circuit Court which was supposed to go out a couple of days ago and which I felt might drag over today, and so I had an understanding that it would be assigned out tonight to be heard Monday, and, just considering my own preference, I would prefer to argue the case when you are here Thursday or at some later date. Now, that is my own preference in the matter.

The Court: The Government?

Mr. Burdell: That is satisfactory, your Honor. Is it your Honor's desire, or does your Honor have

Exhibit X—(Continued)

any interest in the matter, that the matter be argued by the Government before the submission of briefs by the amici curiae, or would you prefer that it be done after the submission of all briefs?

The Court: Well, I have had no feeling about it. Since I have asked these gentlemen to be present, I will consult their own convenience about when they want to bring in their briefs or if they want to make any argument orally or otherwise.

Mr. Burdell: Well, next Thursday is satisfactory, your Honor, to the Government.

Mr. Spencer: If your Honor please, I think I can speak on behalf of counsel who have been appointed in saying for all of them, I think, that our judgment, perhaps, is that we could [117] best serve by filing briefs at a proper time. In the preliminary discussion that we had the other day there was no suggestion that we participate in the argument. In fact, we did not understand that that was expected of us.

The Court: It is not expected of you. I just——

Mr. Spencer: Well, I rather think that whatever service we render could be best rendered in the form of briefs, and at the time I don't know that I am prepared to voice my feelings.

Mr. Solomon: May it please the Court, at the preliminary meeting that we had it was indicated that your Honor desired that we submit those briefs prior to July 13th. At the time of that meeting we were under the impression that we would submit the briefs at this time, but we were notified

Exhibit X—(Continued)

at that time that no briefs would be asked before July 13th, the date upon which your Honor was going to return to Portland. Mr. Green, who was here this morning, his final words were, "Get as much time as you can."

The Court: That is a remarkable suggestion. Just in order to clarify the situation, I think that that must be a misunderstanding. I made no such suggestion as to July 13th.

Mr. Kester: May it please the Court, I think I can explain. The statement was made that your Honor set a number of things over that same morning for the 13th with the understanding that you would be out of the city and not be back and in a position to handle matters until then, and it was thought that probably [118] that date would be in accordance with your Honor's wishes.

Mr. Morris: If the Court please, as I understand, the present question is whether the arguments should be before or after we make our briefs, and I know that any effort that I make by Thursday would not be of value. I don't think I can be ready by Thursday.

The Court: Well, I think that what we will do is go ahead with argument on Thursday, both by the Government and by the defense, and then I will not set any time for briefs by those who are here. They may file briefs at such time as they choose, and the Court will have to give some time on those in any event. I will not give any direction to you, but any-

Exhibit X—(Continued)

thing that you feel that you can give the Court any light and service on I will appreciate your bringing in a brief. I think there are questions that have developed that I had not at all anticipated in the course of the trial of the case. There is one question that has been in my mind, and that is the question of whether the intention of a person possessed of dual citizenship, although not expressed in acts, is sufficient to permit a claim of allegiance of one type of citizenship or the other, whether the existence of an intention that the Court might find would be conclusive, or overt acts which tended to show that he claimed the other citizenship, if the Court thought the overt acts were not in good faith, and, of course the question of fact as to what the intention of the defendant actually was upon the attainment of majority. I think [119] I may say on that question that the Court as trier of the facts is not precluded from a finding of intention to accept Japanese citizenship simply because the defendant has testified that he had no such intent. I just suggest those considerations to you, gentlemen.

If there is nothing further, Court is now in adjournment until tomorrow morning at ten o'clock.

(Whereupon, at 4:58 o'clock p. m., Friday, June 12th, 1942, the oral testimony and proceedings at the trial of the above entitled cause were concluded, the Court taking an adjournment until 10:00 o'clock a. m., Saturday, June 13, 1942.) [120]

[Title of District Court and Cause.]

CERTIFICATE OF REPORTER TO
TRANSCRIPT OF TESTIMONY

I, Cloyd D. Rauch, hereby certify that on Friday, June 12, 1942, I reported in shorthand the oral proceedings and testimony had at the trial of the above entitled cause, that I subsequently caused my said shorthand notes to be reduced to typwriting, and that the foregoing transcript, pages numbered 1 to 120, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 16th day of June, A. D. 1942.

CLOYD D. RAUCH,
Reporter.

[Endorsed]: Lodged in Clerk's office Dec. 15, 1942. G. H. Marsh, Clerk. By R. DeMott, Dep.

[Endorsed]: U. S. District Court, District of Oregon. Filed Jan. 5, 1943. G. M. Marsh, Clerk.

[121]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of appellant is, Minoru Yasui, Hood River, Oregon.

The name and address of appellant's attorneys is, E. F. Bernard, and Collier, Collier & Bernard, 1220 Spalding Building, Portland, Oregon.

The offense of which defendant was convicted is a Violation of Public Proclamation No. 3 of the Western Defense Command, and Public Law No. 503, 77th Congress, approved March 21, 1942.

The date of the judgment of conviction is November 18, 1942.

A brief description of the judgment or sentence imposed on defendant and from which he appeals, is to the effect that defendant be imprisoned for one year in such place as the Attorney General may designate, and pay a fine of Five Thousand (\$5000.00) Dollars, and stand committed until such fine is paid.

The name of the prison where defendant is now confined is Multnomah County Jail, Portland, Multnomah County, Oregon, the place of imprisonment under said sentence having not been designated by the Attorney General.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit, from the judgment above mentioned on the grounds set forth below.

MINORU YASUI,
Appellant

Dated this 20th day of November, 1942.

The grounds of this Appeal are:

First: The Court erred in not sustaining defendant's demurrer to the indictment herein.

Second: The Court erred in over-ruling defendant's motion for a directed verdict of acquittal made immediately after all the evidence herein was introduced.

Third: The Court erred in finding and holding that the defendant was a citizen of Japan and in not holding that he was a citizen of the United States.

Fourth: The Court erred in imposing against defendant the sentence herein described or any sentence.

Due and legal service of the foregoing Notice of Appeal is hereby accepted and admitted in Portland, Multnomah County, Oregon, this 20th day of November, 1942.

CARL C. DONAUGH

United States Attorney

[Endorsed]: Filed Nov. 20, 1942.

District Court of the United States for the
District of Oregon

C-16056

UNITED STATES OF AMERICA

vs.

MINORU YASUI

1. Indictment for violation of Public Proclamation No. 3 of the Western Defense Command Act approved March 21, 1942, filed April 22, 1942.

2. Arraignment, May 4, 1942.

3. Plea to Indictment, Not Guilty, May 4, 1942.

5. Trial by Court, June 12th and June 18th, 1942.

6. Finding of guilty, November 16, 1942.

7. Judgment, one year imprisonment and \$5,-000.00 fine, November 18, 1942.

8. Notice of Appeal filed November 20, 1942.

November 20, 1942.

Attest:

G. H. MARSH

Clerk

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The defendant, in connection with his appeal, makes the following assignments of error which he avers occurred upon the trial of the cause:

1. The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of the United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

2. The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is a citizen of the United States.

3. The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

4. The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that there is no evidence that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

5. The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but alleges facts suf-

ficient to show that the defendant at all times has been a citizen of the United States of America.

COLLIER, COLLIER &

BERNARD

Attorneys for Defendant

State of Oregon

County of Multnomah—ss.

Due service of the within Assignments of Error is hereby accepted in Multnomah County, Oregon, this 15th day of December, 1942, by receiving a copy thereof duly certified as such by E. F. Bernard, of Attorneys for the Defendant.

CARL C. DONAUGH

Of Attorneys for Defendant

[Endorsed]: Filed Dec. 15, 1942.

[Endorsed]: No. 10317. United States Circuit Court of Appeals for the Ninth Circuit. Minoru Yasui, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed January 11, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10317

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

The appellant files this statement of the points on which he intends to rely on the appeal:

1. The indictment does not state an offense in that the laws and regulations which the defendant is charged with violating are void because they deprive him of his liberty and property without due process of law.

2. The indictment does not charge a crime in that it fails to allege that the defendant is an alien but, on the contrary, alleges facts showing that the defendant is, and at all times has been, a citizen of the United States of America.

3. The indictment does not allege a crime inasmuch as the laws and regulations which the defendant is charged with violating deprive American citizens of Japanese ancestry and particularly the defendant of liberty and property without due process of law, and in that they deny American

citizens of Japanese ancestry and particularly the defendant the equal protection of the laws.

4. The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of the United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

5. The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is a citizen of the United States.

6. The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien, but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

7. The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that there is no evidence that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

8. The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but alleges facts sufficient to show that the defendant at all times has been a citizen of the United States of America, and for the further reason that the laws and regula-

tions which the defendant is charged with violating are void because they deprive him of liberty and property without due process of law.

The appellant designates that the entire record be printed including the Bill of Exceptions, and the transcript of the evidence made a part thereof.

E. F. BERNARD

Of Counsel for Appellant.

Service of the foregoing Statement and designation on this 18th day of January, 1943, is hereby admitted.

J. MASON DILLARD

United States Attorney

[Endorsed]: Filed Jan. 20, 1942.

No. 10,317

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MINORU YASUI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT.

WAYNE M. COLLINS,

Mills Building, San Francisco,

Amicus Curiae.

FILED

FEB 17 1949

PAUL P. O'BRIEN,
CLERK

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No. 10,317

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MINORU YASUI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOS- ING BASIS OF COURTS' JURISDICTION.

This is an appeal prosecuted by the appellant from a judgment of conviction followed by a sentence to one year of imprisonment and the imposition of a \$5000.00 fine rendered and entered against him by the United States District Court in and for the District of Oregon, sitting without a jury, in a criminal case arising out of an indictment charging him with the commission, on March 28, 1942, of a misdemeanor under the provisions of Public Law No. 503 in that he violated the curfew regulation imposed upon him as a person of Japanese ancestry by the provisions of Public Proclamation No. 3 promulgated by General DeWitt. The written opinion of the Court below is reported in Fed. Supp. and also appears in the record herein at pages 13 to 53.

The Statutory Provisions Believed to Sustain the Jurisdictions.

The District Court below had jurisdiction of this case under the provisions of Title 28, U. S. Code, Section 41, subdivision (2).

The Circuit Court of Appeals, Ninth Circuit, has jurisdiction upon appeal to review the judgment of the District Court below by virtue of the provisions of Title 28, U. S. Code, Section 225, subdivision (a) First and subdivision (d).

Statute and Proclamation the Validity of Which Are Involved.

1. *Public Law No. 503*, 77th Congress, 2nd Session, Chap. 191, H.R. 6758, approved March 21, 1942, and now codified as Title 18 *U. S. Code*, sec. 97a, the validity of which is involved herein, reads as follows:

“Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.”

2. *Public Proclamation No. 3*, promulgated March 24, 1942, by J. L. DeWitt, Lieutenant-General, U. S.

Army, commanding the Western Defense Command and Fourth Army, the validity of which is involved herein, imposed "curfew" regulations upon the appellant as a person of Japanese ancestry, prohibited him from traveling beyond a distance of five miles from his residence and denied him the right to the possession, use and enjoyment of certain articles of personal property, to-wit, weapons, radios, cameras, signal devices and sundry other articles. This proclamation is set forth verbatim in 7 *Fed. Reg.* 2543 and also at pages 330 and 331 in *House Report No. 2124* of May 1942 as authorized by House Resolution 113 of the 77th Congress, 2nd Session.

Pleadings Necessary to Show the Existence of the Jurisdictions.

The pleadings necessary to show the existence of the jurisdictions herein are as follows: the *indictment* (R. 2); a *demurrer to indictment* which appears to have been a special demurrer interposed orally and later withdrawn (R. 9); *stipulation amending indictment* (R. 6); *order amending indictment* (R. 8); the appellant's *plea of not guilty* (R. 9); *general demurrer to indictment* interposed at the close of the testimony (at R. 10) and orally termed "a motion for a directed verdict and for a verdict and judgment of not guilty" and also termed "a motion for a mandatory verdict or judgment of not guilty" (Record, pages 10 and 88), and *order overruling this general demurrer* or motion for dismissal of the indictment. (R. 11.)

The *judgment of conviction* appears in two forms, the first termed the "*Finding of Guilt*" (R. 12) and the second which is incorporated in the written *opin-*

ion of the Court below. (R. 50.) The *sentence* to imprisonment and judgment imposing the *fine* appear in the record at pages 51 and 52. The *notice of appeal* appears at R. 214, the *assignment of errors* at R. 217 and the *statement of points on appeal* at R. 221.

STATEMENT OF THE CASE.

The appellant was born in Hood River, Oregon, of Japanese parents on October 19, 1916. (R. 77, 120, 148.) Hood River is his domicile and residence. His father was a Hood River merchant and his mother a housewife. (R. 149-151.) He and his parents are Methodists. (R. 178.) He was taken to Japan for a visit during a summer vacation when he was eight years of age. (R. 151, 182.) He graduated from a public grammar school and high school in Hood River. (R. 153-154.) He studied the Japanese language in a Japanese language school for three years. (R. 176-177.) He graduated from the University of Oregon in arts and letters in June of 1937, receiving a bachelor of arts degree. (R. 154.) He was then 20 years 7 months of age. He received his commission as a second lieutenant in the U. S. Army Officers Reserve Corps upon completion of his R.O.T.C. course and took his *oath of allegiance* to the United States in December, 1937, after attaining his majority and when his age was 21 years 2 months. (R. 174.) (The opinion of the Court below (R. 48) erroneously states this occurred during his minority and that by reason thereof was not evidence of his election to

accept citizenship in the United States.) Thereafter, he graduated from the University of Oregon Law School, receiving his bachelor degree in law in June of 1939 at the age of 22 years 8 months. (R. 154, 174.) He is a registered voter and has voted in elections. (R. 154.)

After taking the bar examination in the interval between June and August of 1939 he worked on his father's farm and upon notification in September of 1939 that he had successfully passed the examination he practiced law for a short time in Hood River and then in Portland. (R. 155.) He must also have taken an oath of allegiance to the United States when he was admitted to the bar. Upon the recommendation of his father, Dean Wayne L. Morse of the Oregon Law School, several university officials (R. 171) and other persons in Hood River and Portland he obtained employment in the office of the Consulate General of Japan at Chicago in April of 1940. (R. 151-156.) His tasks there were those of a general secretary in charge of correspondence (R. 157) and later as a public relations man. (R. 133, 137.) He received a salary of \$125.00 per month. (R. 157.) As a part of his employment he made speeches before public bodies. A few of these speeches concerned the Sino-Japanese war and explained the Japanese position thereon. (R. 158, 159, 171, 183-185, 189.) While so employed among other American employees (R. 188) he was twice registered as an employee with the Department of State pursuant to regulations. (R. 81, 105, 106.) The certificates of registration appear at record pages 58 and 113.

Sometime during the day or evening of December 7, 1941, the appellant first heard of the Japanese attack on Pearl Harbor. (R. 159.) He resigned his position on December 8, 1941, because he was a loyal American. (R. 160.) On December 8, 1941, Congress declared war on Japan. On the same day the appellant tendered his services to his country, to Headquarters, Second Military Area, at Portland, by telegram (R. 162) and received a letter bearing said date in response instructing him to hold himself in readiness for an early call to active duty. (R. 162 and 84.) He received a telegram from his father on December 8th urging him to offer his services to his country. (R. 160, 161.) Thereafter, on March 28, 1942, appellant violated the curfew restrictions imposed upon American citizens of Japanese ancestry by Public Proclamation No. 3 promulgated on March 24, 1942, by General DeWitt. (See 7 F.R. 2543.) He surrendered himself to the Portland Police Department on March 28, 1942, for the purpose of testing the constitutionality of this discriminatory curfew regulation (R. 111), was taken into custody (R. 95, 96, 99) and was thereafter indicted under Public Law No. 503 (18 U.S.C.A., sec. 97a) for a violation of the proclamation.

Questions Involved.

1. Is Public Law No. 503 void for uncertainty in failing to prescribe definite military areas and in failing to specify the particular restrictions upon the activities of persons therein?

2. Is the statute unconstitutional and void as delegating to Courts and juries the legislative power to determine what acts thereunder shall be deemed to be criminal and punishable?

3. Is the statute unconstitutional and void as an attempt to delegate to executive and administrative officers legislative power to be exercised *in futuro* in prescribing military areas of unlimited geographical extent and restraints of an unknown nature upon persons therein?

4. Is the statute as applied to appellant herein and to all American citizens of Japanese ancestry, in enforcing the provisions of Public Proclamation No. 3, to the exclusion of citizens of other racial origin, unconstitutional and void as abridging the fundamental rights and liberties of American citizens safeguarded by the U. S. Constitution and amendments thereto and especially by the 5th Amendment?

5. Are the statute and proclamation void because of the inseverability of their void features?

6. Can the appellant judicially be declared an alien enemy in a judgment of conviction where the indictment admits and alleges his citizenship?

7. Can the appellant judicially be declared an alien enemy despite the fact that he is a native-born citizen of this country and a national thereof, residing and domiciled here, and entitled to all the constitutional rights, liberties, privileges and immunities of national and state citizenship by virtue of the 14th Amendment and the Nationality Law when there is

not a scintilla of evidence in the record that he has lost citizenship or nationality under any of the methods prescribed by the nationality and expatriation laws of this country or by any other legally recognized method whatever?

Manner in Which Questions Involved Are Raised.

The questions involved are raised by the indictment (R. 2), the amended indictment (R. 8); the plea of not guilty (R. 9); the general demurrer to the indictment (motion for directed verdict and judgment of not guilty) (R. 10, 88); the judgment of conviction (R. 12) and opinion of the Court below (R. 50), and the judgment of sentence and fine. (R. 51.) The questions are also raised by the notice of appeal (R. 215) and the assignment of errors. (R. 217.)

ARGUMENT.

THE STATUTE IS VOID FOR UNCERTAINTY.

Public Law No. 503, 18 *U.S.C.A.* 97a, is void for uncertainty on its face in failing to prescribe specific military areas and specific restrictions upon the activities of persons within the confines of the military areas. See 59 *Corpus Juris* 601, sec. 160 and cases there cited. It is also unconstitutional and void as a delegation by Congress of legislative power to Courts and juries to determine what areas are military areas and what acts of persons committed therein shall be decided to constitute criminal acts and be punishable thereunder. *U. S. v. L. Cohen Grocery Co.*, 255 U.S.

81. The statute was enacted and became effective on March 21, 1942, and Public Proclamation No. 3, a military regulation which it would enforce, was promulgated three days later on March 24, 1942. It is, therefore, also void for uncertainty as attempting to adopt, by reference, legislative orders of executive or military officials which are not *in esse* but are unknown, indeterminate and to be prescribed *in futuro*. *Schechter Poultry Co. v. U. S.*, 295 U.S. 495, 55 S. Ct. 837; 16 *Corpus Juris Sec.*, pp. 349, 352; and *Ex parte Burke*, 190 Cal. 326, 328.

**THE STATUTE AND PROCLAMATION ARE VOID AS ABRIDGING
FUNDAMENTAL CONSTITUTIONAL PROVISIONS.**

The statute is unconstitutional and void in giving effect to military orders which usurp legislative and judicial functions in violation of *Article 1*, Secs. 1 and 8, cl. 18, and *Article III* of the federal *Constitution*. Congress cannot delegate legislative power to the president or executive officers. *Field v. Clark*, 143 U.S. 649, 652. Congress is empowered to delegate a mere *limited discretionary authority* to executive officers where it first sets up in a statute a standard, rule or policy for the guidance of such officials and lodges in them the making of subordinate rules, in aid of the enforcement of the statute, and leaves to them the determination of facts to which the policy declared in the statute is to apply. The subordinate rules these officials may make must be confined to the limits prescribed by the statute. *Schechter Poultry*

Corp. v. U. S., supra; *Panama Refining Co. v. Ryan*, 293 U.S. 388. Congress has not attempted to validate Public Proclamation No. 3 and could not validate it because it does not pretend to be the product of a limited discretionary authority conferred upon its promulgator by Congress but to be a product of usurped legislative power that can be wielded only by Congress and not by a military commander.

Public Proclamation No. 3 was promulgated, according to a recital contained therein, under an asserted theory of military necessity. It has been applied, in conjunction with the statute herein as its enforcement procedure, to the appellant and other citizens of Japanese ancestry engaged in civilian walks of life within the geographical limits of the mainland United States in a region outside a theater of war and in the absence of a proclamation of martial law by Congress and in an area free from martial rule. The statute and the proclamation are void, therefore, under the rules established in *Ex parte Milligan*, 4 Wall. (U.S.) 2, in that they would suspend the federal Constitution and destroy the fundamental civil liberties it safeguards to citizens and also to those aliens unaffected by the *Alien Enemy Act*, 50 U.S.C.A., Secs. 21-24.

The proclamation and the statute which would enforce its curfew regulations, travel restrictions and property deprivations are void as deprivations of liberty and property without due process of law in violation of the *5th Amendment*. These regulations and restrictions abridge *freedom of movement* and other

inherent rights vital to the maintenance of our democratic institutions. See *Crandall v. Nevada*, 6 Wall. 35, 48-49; *Williams v. Fears*, 179 U.S. 279; *Edwards v. California*, 314 U.S. 160; and *Schneider v. Irvington*, 308 U.S. 147, 161, discussing these rights. These constitutional rights also inhere in aliens (*Truax v. Raich*, 239 U.S. 33, 39) but are subject to suspension in the case of *alien enemies* during wartime under the *Alien Enemy Act*. This Act has not, however, been invoked by Public Proclamation No. 3 which derives its authority, if any it has, from Executive Order No. 9066 (7 F.R. 1407) which asserts its own authority not under this Act but upon constitutional grounds which are nowhere to be found in the Constitution. The proclamation and statute as applied to aliens outside the provisions of said Act are illegal and void.

The proclamation is also unconstitutional in that it discriminates against and denies to citizens of Japanese pedigree the possession, use and enjoyment of the private articles of personal property it forbids to them or compels them to confiscate under an asserted claim the deprivation or confiscation is for a public use or benefit. This is a taking of private property for public use without just compensation as well as a deprivation of property without due process of law in violation of the *5th Amendment*. (*Smith v. Brazelton*, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678; 67 *Corpus Juris Sec.*, pp. 373 and 376.) The proclamation also infringes the right of citizens to keep and bear arms and hence is repugnant to the *2nd Amendment*. Congress is not empowered by legislation to discriminate against citi-

zens on a color or race origin basis and, consequently, the proclamation and statute are both unconstitutional and void. (See, *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 46 S. Ct. 619, 625, 627; *Sims v. Rives*, 84 Fed. (2d) 871, cert. den. 298 U. S. 682; *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 55 S. Ct. 758; and compare, *Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16.) The operation of the 5th Amendment is not suspended by war. (*U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81.) Constitutional rights cannot be abrogated in wartime under a plea of military necessity except in a theater of war where the conflict rages and necessarily prevents the civil authorities from operating. (*Ex parte Milligan*, supra.) The proclamation and statute interfere with the constitutional rights and liberties of the appellant and other citizens of like racial extraction outside a theater of war and in the absence of martial law and rule and, in consequence, are void under the *Milligan* decision. If the contents of the proclamation are not either directly or indirectly authorized by the Alien Enemy Act it is also void as to alien enemies for the same reasons. Alien enemies who are not hostile to us have rights safeguarded by the Constitution. The plea that *military necessity* or *national crisis* justifies the suspension of constitutional rights by executive officials was repudiated in the *Milligan* case and rejected in *Schechter Poultry Co. v. U. S.*, 295 U. S. 495, 55 S. Ct. 837 at 842, where the Supreme Court declared:

“Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers

deemed to be adequate, as they have proved to be in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment * * *."

The proclamation and the statute demonstrate that executive officials and Congress are not always protectors of the rights of minorities. It is to our Courts that we must look finally for the protection of the rights and liberties of minorities as observed by the Supreme Court in *Chambers v. Florida*, 309 U. S. 227, where it is stated:

"Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."

CITIZENS ARE NOT ALIEN ENEMIES.

Public Proclamation No. 3 treats American citizens of Japanese ancestry as alien enemies. These citizens constitute a law-abiding part of our citizenry. They have as much at stake in this country and nation as any other segment of our citizenry. Without justification and without right the proclamation labels them suspects, disloyal and criminals. Never before in our

history have innocent citizens been so treated because of the geographical origin of their ancestors. It engendered fear in them. By reason of the precedent it would establish it compels a whole nation to stand in awe of our military commanders and in fear of incurring their displeasure. Our history reveals that we have been wont to hold our military commanders and government officials in high esteem and to regard them with affection. It is startling to learn that citizens must fear their own protectors. Those who had a hand in fanning the flames of race-hatred against these citizens by dictating this discriminating policy to be enforced against them by the Army regard American citizenship very lightly when it concerns the rights of others. The proclamation herein was the prelude to the banishment of these citizens from the Pacific Coast. Under the compelling points of bayonets and threats of prosecution under the statute they have been driven into concentration camps inland. Their future is precarious, their livelihood doubtful and their constitutional rights have been destroyed.

There are over 5000 American youths of Japanese ancestry serving alongside their white brothers in our armed forces which are spread over the face of the earth. Thousands of others are serving in the Hawaiian Territorial Guard. The induction of additional numbers of these citizens was interrupted for a short space of time during which those arriving at serviceable age were temporarily classified as 4c under the Selective Service Act. The reason for this policy has never been publicly explained. It would be strange

that any officials or politicians should take it upon themselves to tell these American youths who were clamoring to fight for their country that they could not do so. This country belongs to these youths as much as to any other citizens. They cannot be discriminated against and be deprived of their birthright to defend this country by arbitrary governmental action. Our government exists for the benefit of the citizens of this Republic and not for the benefit of government officials. Our government officials are their agents and ought not to lose sight of the fact. They are accountable to their principals, these citizens and the citizenry at large. On January 28, 1943, Mr. Henry L. Stimson, Secretary of War, reversed this unwarranted policy, and announced that these youths would be absorbed into service. As quoted in the *San Francisco News* of January 28, 1943, on page 1, Mr. Simpson is reported to have stated:

“It is the inherent right of every faithful citizen, regardless of ancestry, to bear arms in the nation’s battle. When obstacles to free expression of that right are imposed by emergency considerations, those barriers should be removed as soon as humanly possible. Loyalty to country is a voice that must be heard, and I am glad that I am now able to give active proof that this basic American belief is not a casualty of war.”

It is probable that every family of Japanese blood in this country and subject to our jurisdiction has a member serving in our armed forces. Does this not indicate quite clearly that these youths are loyal, patriotic and devoted to this country and nation?

Does it not constitute an irrefutable argument that their families are loyal and willing to do their share to contribute to the inevitable victory over our enemies? The bombs our Japanese enemies rained on Hawaii fell alike on our aliens and citizens resident there and destroyed many of them and much of their property. Is it any wonder that our American citizens of Japanese ancestry there and on the mainland here clamored to get into service to destroy our enemies? Is it any wonder that our alien Japanese resident there and here whose friends and relatives were high among the casualty lists in Hawaii and whose sons are in our armed forces are devoted and loyal to this country and willing to contribute their services and do what they can to defend America and to defeat our enemies? These aliens are grateful to America. They abandoned Japan to escape from the jurisdiction of a military feudalism and oppressive government. They sought the refuge of America and the protection of American democracy. In the face of these facts who would dare charge disloyalty on their part and that of their children to America?

THE STATUTE AND PROCLAMATION ARE WHOLLY VOID BECAUSE OF THE INSEVERABILITY OF THEIR VOID PARTS.

In its opinion the Court below decided that as the statute attempts to classify citizens upon a color or race basis and "to apply criminal penalties for a violation, founded upon that distinction, the action is insofar void." (R. 45.) It also declares that aliens are

entitled to the "equal protection of the laws" in ordinary times but not in times of war. (R. 45.) This conclusion is not entirely correct for alien neutrals are entitled to this protection at all times. Alien enemies are likewise entitled to this protection except when the *Alien Enemy Act* is invoked against them. See *Ex parte Kumezo Kawato*, 87 L. Ed. 94, 95.

The Court below expressly decided that the orders of General DeWitt "*were void as respects citizens*" and "*valid with respect to aliens.*" (R. 46.) The statute, however, imposes its prohibitions upon all persons inasmuch as it uses the generic word "*Whoever*". Executive Order No. 9066 authorizes the removal of "*any and all persons*" from military areas. The proclamation expressly applies to "*all alien Japanese, Germans, and Italians and all persons of Japanese ancestry*" within Military Area No. 1. The statute and proclamation apply to *all persons* whether citizens or aliens and, in consequence, are entirely void because the respective parts of each are inseparably connected and are not severable so as to apply to alien enemies to the exclusion of alien neutrals and citizens. The opinion of the Court below is, therefore, erroneous and the judgment void. See *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 55 S. Ct. 758, 767, and rules and cases cited in 59 *Corpus Juris*, p. 639, Sec. 205, relating to severability.

The inseverability of the void features of the statute and of the proclamation invalidates their application to alien enemies also. It is not unlikely, however, that the action applied by the proclamation against alien

enemies which cannot be sustained under it might yet be sustainable under the theory that the action was taken pursuant to an oral command of the President authorized by the *Alien Enemy Act*. If such a command was given it has not been reported. The President invoked the *Alien Enemy Act* in Public Proclamations Nos. 2525, 2526, 2527 and 2537 and in Executive Order No. 9095 in matters involving alien enemies. See *H. R.* 310 to 315. Alien enemies are not, however, punishable under the statute herein which is void for the foregoing reasons. The trial Court's judgment that the appellant was an alien enemy amenable to the statute was erroneous because of the invalidity of the statute as well as for the reason the appellant was and is a citizen.

THE STATUTE AND PROCLAMATION DENY LEGAL EQUALITY TO CITIZENS.

The statute and proclamation discriminate against American citizens of Japanese ancestry to the exclusion of citizens of other ancestral derivation and therein do violence to the fundamental principle of legal equality upon which this nation was established. Citizenship is not a divisible thing: it is not a thing of degrees. It is a status of legal equality. A few of our native-born whites suppose they derive citizenship from the mere fact they are members of a white race but they are mistaken. They derive it from the 14th Amendment which confers citizenship upon all those who have the good fortune to be born here regardless

of their race, color or creed. The discrimination against these citizens on the basis of the geographical origin of their ancestors attempts to divide our citizenry and set up classes of citizens and degrees of citizenship. In effect it asserts the supremacy of the citizens of Anglo-Saxon, Mediterranean and African stocks in the United States under the theory they are citizens either of the pure white race or the pure black race for whom full citizenship rights are preserved. These stocks never represented races however. They represent old Continental nationalities of peoples of diverse geographical origin who for a while inhabited Europe and its isles, the Mediterranean coast and Africa and were subject to various European and African rulers. Legal equality inheres in citizenship, is an attribute of liberty and the heritage of every American citizen regardless of the geographical origin, color and creed of his forebears and is safeguarded by the 5th and 4th *Amendments* and by the privileges and immunities clause of the latter and Sec. 2 of Art. IV of the *U. S. Constitution*. Its denial is a deprivation of liberty and property without due process of law. See definition of *due process of law* in *Truax v. Corrigan*, 275 U. S. 312, 331.

Nationality and not race is the characteristic of this nation.

Race purity and race type are delusions of those who entertain the notion that blood strains are pure. The belief that coloration, mere skin pigmentation, divides mankind into pure races is unfounded. Chromosomes and their genes are not respecters of what is

popularly called race or race-purity. They are asurers of a necessary admixture of bloods that has enabled and will continue to enable the human race to survive in changing environments by transmitting physical qualities and immunities essential to the survival of the human race. The difference in individuals has its basis in somatic cells and, in consequence, is restricted to trifling structural details of which skin pigmentation is the most noticeable feature. These structural matters are peculiar to individuals and are not determiners of races. The only race in mankind is the human race. What are popularly considered races is a confusion of obscure ideas, vague nomenclature, confused genealogy and hazy thought. Differences in skin-pigmentation do not make races. Individuals cannot even be properly classified by coloration which is neither a criterion nor an indication of race, quality of mind or temperament. Individuals and peoples can be properly identified only by *nationality*. It is this identification by nationality that is the distinguishing characteristic of individuals. The word *nationality* ought to be substituted in the popular concept for the word *race*. Suffice to say that the nationality of all of our citizens of Japanese and other familial ancestry is absolutely American. Each citizen is an integral part of the great American family to which he is inseparably bound by the American environment ingrained in his mind. The proclamation herein denies to citizens of Japanese ancestry rights it does not disturb in others. It would whittle away citizenship rights and consequently citizenship itself.

What distinguishes a nation is a common environment of country, tradition, law and national self-interest and objectives. The imprint of this environment is indelibly stamped in the mind of each citizen and in the minds of all those who permanently reside within a country's jurisdiction. It creates nationalism which is not a thing of ancestry but of environment. The country of one's domicile and residence and the nation inhabiting it which sustain and protect him gives rise to his allegiance, loyalty and patriotism. This nation was founded by those who were seeking liberty and equality. The Constitution they gave us embodies these basic concepts which are essential to a democratic state. The Constitution guarantees legal equality. It does not guarantee social equality which is dependent upon education, understanding and personal taste. Legal equality is a right—social equality is something that may be achieved. Legal equality is the birthright of every American citizen. Ancestry is not a determiner of constitutional right but it may be of social equality. It is not a determiner of loyalty. Singularly enough, many of those who, by the mere accident of birth, have a pinkish or whitish complexion conceive of themselves as typical representatives of a white race as though this conception of skin coloration was of more importance to this nation than the conception of an American citizen. Race, a thing of vagary, looms larger in their minds than American nationality, a thing of reality, which determines allegiance, loyalty and patriotism.

The white-complexioned in America have no legal authority to suppress the rights of the yellow, the red

and the black citizen. Ours is neither a government by majority nor plurality rule. The Constitution guarantees the rights of all and sets up barriers against such rule. If ours was a government of or by the majority we would all long ago have been of a distinctive familial type of immediate ancestry having one color and one dominant state religion. Religious wars would have torn us asunder and the most powerful religious group would have suppressed other faiths or exterminated those adhering thereto. America would have been left in the possession of the dominant Protestant element which would have asserted an Anglo-Saxon origin, a combination of old foreign nationalities, and have tolerated no inhabitants of other faiths or origin.

There are a few individuals in this country who would take delight in having our Constitution distorted into a Visigothic Code in order to suppress the rights of Jews, Japanese and other minorities. There are many would-be Caligulas in America. They are of the peculiar type who would reserve this country for the whites. They would also reserve heaven for the whites and its opposite for all others. Divine Providence would appear to have made other provisions.

STRANGE EVIDENCES OF ELECTION OF FOREIGN ALLEGIANCE.

The "evidences" on which the Court below (R. 49, 50) determined that the appellant made an election of citizenship and "chose allegiance to the Emperor

of Japan, rather than citizenship in the United States at his majority" are as follows:

(1) His father "was decorated by the Emperor of Japan".

(2) After admittance to the bar he was, at the instigation of his father, employed by the Consulate General of Japan at Chicago.

(3) While so employed he followed his employer's orders and "made speeches setting forth the philosophy and purposes of the military caste of Japan as propaganda agent for the Emperor."

(4) While so employed he was twice registered as a propaganda agent "pursuant to the regulations issued by the State Department of the United States."

(5) He remained as such "propaganda agent until after the declaration of war by this country against Japan" and after the Japanese attack on Oahu.

The Decoration.

The appellant's father received some sort of recognition, testimonial or honor in 1940 at the Japanese Consul's office in Portland. (R. 181.) The recognition apparently was given for his activities "in promoting better relations between the Japanese and Americans in Hood River." (R. 181, 182.) This was considered evidence adverse to the appellant by the trial Court whose written opinion (R. 50) recites the appellant's father "was decorated by the Emperor of Japan." This is an extraordinary finding of fact wholly un-

supported by the evidence. It was inferred from a question put by the prosecution (R. 181) and answered by the appellant as above-mentioned from hearsay. The action of the father in endeavoring to promote better relations between these Hood River people is a commendable matter. Whatever the nature of the honor, if any, bestowed upon him for his endeavors in a worthy cause, it was deserved. Our own government and also friendly societies interested in the assimilation of minority groups into community activities might have bestowed honor upon him therefor had his efforts been called to their attention. The Court below has penalized the appellant for an honor bestowed upon his father under the theory, as the opinion openly declares, that this matter was an evidence of appellant's election of allegiance to Japan. The conclusion of the trial Court is an example of illogic run wild.

The Employment.

The employment of the appellant by the Consulate General of Japan at Chicago was obtained through the instrumentality of recommendatory letters of the appellant's father, Dean Wayne L. Morse of the Oregon Law School, several other deans and officials of the university (R. 171) and sundry other persons in Hood River and Portland. (R. 155-156.) The recital in the opinion below that this employment was obtained at the instigation of the appellant's father is only partially true. The mere fact of this lawful employment is not evidence of an election upon the part of the appellant to choose "allegiance to the

Emperor of Japan” despite the trial Court’s declaration (R. 49) that it is evidence of such a choice.

The Speeches and Free Speech.

The speeches made by the appellant under the terms of his employment by the Consulate General of Japan dealt with various subjects. (R. 158, 159.) They were made during *peacetime* and before the outbreak of war. A few were explanatory of the Japanese position in the undeclared war, the Sino-Japanese conflict, with special emphasis on the economic differences between China and Japan. (R. 188, 189.) During the period of time he made these speeches our own government was carrying on normal trade relations with Japan. We were selling munitions of war to Japan which were being used to destroy Chinese lives and property. It was our national foreign policy to maintain peaceful and friendly relations with Japan and the American public never dreamed Japan had any warlike designs on us. The appellant never dreamed Japan had any warlike designs on us. Had our government believed in such designs our trade relations would have ceased abruptly and we would not have had the disaster at Pearl Harbor. The appellant never condoned the military aggression of Japan against China in any of his speeches. (R. 189.) His motives in making these speeches were honorable ones. (R. 184.) Many other persons were making similar speeches in America. The opinion below sets forth that one of the evidences of appellant’s election of “allegiance to the Emperor of Japan” was that he “made speeches setting forth the philosophy and pur-

poses of the military caste of Japan as propaganda agent for the Emperor." (R. 49-50.) Speeches made during a period we were on friendly terms with Japan and while a war between Japan and China was in progress but in which this government took no part and which related to the economic bases of that war do not form a basis for the trial Court's statement.

The characterization of a general secretary in charge of correspondence who becomes a sort of public relations man by the label of "propaganda agent" is a distortion of fact by an adroit choice of wording. Obviously the speeches made by the appellant were explanatory in nature and contained statements of opinion on controversial issues. Copies of the speeches were not introduced into evidence and the testimony as to their contents was of a rather vague nature. Suffice to say, however, that the testimony as to their contents discloses the speeches were made in peacetime and did not contain an advocacy of anything forbidden. No penalty attaches to their utterance. The guarantee of *freedom of speech* under the 1st *Amendment* and the similar guarantee under the 14th contemplate absolute freedom of expression falling short of seditious utterances. See *Gitlow v. New York*, 268 U.S. 652, and formulation of "*clear and present danger*" rule in the dissent of Justice Holmes therein which became the rule established by the Supreme Court in *Schenck v. U. S.*, 249 U.S. 47. See also *Bridges v. California*, 86 L. Ed. 149, 153; *Thornhill v. Alabama*, 310 U.S. 88; *Hague v. C. I. O.*, 307 U.S. 496; *Lovell v. Griffin*, 303 U.S. 444; *Palko v. Connecticut*, 302 U.S. 319; *De Jonge v. Oregon*, 299 U.S.

353, 366, and *Stromberg v. California*, 283 U.S. 359, 368. From the meager evidence in the record as to the nature of the speeches it clearly appears they contained neither reprehensible nor unlawful utterances. It would tax the imagination to conceive how lawful speeches could be considered evidence of an election to renounce citizenship in the United States and acquire citizenship in Japan.

The Registration.

The registration of the appellant by the Consulate General with the Department of State as an employee of a foreign representative is a legal requirement. (See R. 58.) It is not evidence of an election upon the part of the appellant to choose "allegiance to the Emperor of Japan" notwithstanding the trial Court's statement in his opinion (R. 49, 50) to the contrary.

The Resignation.

We were attacked by the enemy forces of Japan at Oahu on Sunday, December 7, 1941. The news of the attack came over the radio in the late morning of the 7th and the announcement appeared in newspaper extras that evening and in the regular editions the following morning. The appellant heard the news on the day or evening of Sunday, the 7th (R. 159) but at what time the record does not disclose. He resigned his position on Monday, December 8th, the morning following the attack. (R. 160.) His resignation was very prompt under the circumstances for he could not have resigned on the Sabbath when he was not at work and the Consulate offices were closed. The

radio announcements made during the 7th exhibited confusion as to whether the hostile act was war or whether it was an unauthorized attack by uncontrolled Japanese forces acting without sanction of the Japanese government. The announcement that Japan had declared war against Great Britain and the United States was first received here from Tokyo radio reports published in the Monday morning newspapers. On December 8th Congress formally declared war against Japan. The appellant had already resigned his position. The Court's statement in the opinion (R. 50) that the appellant remained a "propaganda agent until after the declaration of war by this country against Japan" is erroneous and wholly unsupported by the testimony and facts. Its finding that the appellant remained in the employ of the Consulate General "after the treacherous attack by the armed forces of Japan upon territory of the United States in the Islands of the Pacific" (R. 50) is true only in so far as he remained therein until he had time to resign a few hours later when the Consulate office opened on Monday. His action in resigning on December 8th was not only prompt but was probably tendered without verification of the fact that the hostile attack was actually the commencement of war.

**THE ASTONISHING CONCLUSIONS DRAWN BY
THE TRIAL COURT.**

In the opinion (R. 50) the trial Court concluded that the appellant "served the purpose and philosophy of the ruling caste of Japan as a propaganda agent

because he could speak English, and only resigned when it seemed apparent that he could no longer serve the purposes of his sovereign in that office, but could do better execution in the event he could be commissioned an officer in the armed forces of the United States on active service." It also concluded that "since Yasui is an alien who committed a violation of this act, which included by reference the regulations of the commander referring to aliens, the Court finds him guilty."

These are astonishing conclusions. The appellant is an American citizen by birth. He is domiciled here and resides here. He was reared and educated here. He and his parents are Methodists. He was commissioned as a reserve officer and took his oath of allegiance as such *after* he had attained his majority. He is a registered voter. He is an attorney-at-law and doubtlessly took his oath of allegiance to this country upon being admitted to the bar when he was almost 23 years of age. He is a member of the Japanese-American Citizens League. (R. 178.) It is doubtful if there are persons in the United States whose devotion and loyalty to this country exceeds that of the members of this League. They have no peers in patriotism. The appellant tendered his services to this country as a reserve officer on December 8, 1941, the day following the Pearl Harbor attack and the day on which Congress declared war on Japan. Thereafter he eagerly sought to be assigned to active duty against our enemies. What more could he offer to his country to demonstrate his loyalty, devotion and allegiance? The testimony of impartial witnesses

proves that he viewed and had declared the Japanese government to be a criminal one. (R. 112, 117.) That he is devoted to the United States was amply proved by his declarations that he would intern and, if necessary, destroy all the Japanese in this country had he been in command of our defense and believed such action necessary to our safety. (R. 113, 125, 126, 128, 160 and 186.)

It is apparent from the record that the trial Court reached its incredible conclusions from the appellant's responses to an interrogation by the Court. (R. 193-201.) It appears that one of the reasons the Court found him guilty is that the appellant accepted his employment after he had heard stories of the pre-war utterances of Matsuoko, an old graduate of the University of Oregon, who became, for a while, a foreign minister of Japan. (R. 193-194.) Matsuoka was an admirer of Mussolini and an articulate person whose rise to political heights in Japan was meteoric and whose drop to political depths of unpopularity was just as rapid because of his exaggerated self-importance and bellicose statements. He was the man who attained widespread publicity by walking out on the League of Nations and was once widely quoted as stating "Mussolini stalks with God", the substitution of the word stalks for the word "walks" having been unintentional. Why should the utterances and attitude of one Japanese official, known to the appellant only by hearsay reputation, have prevented him from accepting employment in the Japanese Consulate General's office?

The underlying reason, however, for the Court's amazing finding of guilt is that the appellant in his civilian capacity as a citizen would test the constitutionality of this proclamation whereas if called into active military service he would obey the mandates thereof as orders of his commanding officer. (R. 197-201.) The trial Court evidently entertained a notion that a reserve officer who is not in active service and whose status is that of a civilian engaged in private pursuits occupies the status of a military man who is within the jurisdiction of the military authorities and must obey military orders whether constitutional or not. Such a concept is entertained only by those whose background or profession is a military one. Military government cannot be substituted for civil government for civilians holding reserve commissions who are not in active military service. If it could all that would be necessary to supplant civil law would be for the government to declare every person in the country a reserve soldier subject to military law and discipline.

CONCEPTS OF INTERNATIONAL LAW.

In deciding that the appellant was not a citizen but an alien enemy, the trial Court made the following remarkable statement in its opinion (R. 46):

“By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining his majority, but not before, the right of election as to whether he would ac-

cept citizenship in the United States or give his allegiance to the Emperor to whom he was bound by race, the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline."

The international law to which the Court refers is non-existent. The authority cited by the Court in support of this extraordinary conclusion is *Perkins v. Elg*, 307 U. S. 325, a case involving the laws of Sweden and the United States but not the laws of Japan. The case held that where a native born child had been taken to Sweden where she was, under Swedish law, deemed a citizen of Sweden she was entitled to return here upon attaining her majority and elect to retain American citizenship.

A grant of citizenship by a foreign power to persons outside its own territorial jurisdiction and within the jurisdiction of another power does not establish dual citizenship. It is a mere offer to individuals requiring their acceptance and the consent of the government having actual jurisdiction over them. In international law dual citizenship exists when a person holding citizenship in one country is physically present in the territorial jurisdiction of a foreign power which, by reason of his presence there, recognizes him as a person entitled to citizenship rights. In such an event the person does not lose his original citizenship except by renunciation or expatriation according to the laws of the country in which he holds original citizenship. The only exception to these rules is where two countries by law confer citizenship

directly upon persons by consent of the respective sovereigns but in such instances the jurisdiction of each is operative only when the person is physically within its territory. A case of this nature is that of the lineal descendants of General Lafayette who hold French citizenship by reason of French law and also American citizenship by virtue of an act of Continental Congress, but the citizenship rights they hold in the United States can be exercised only when they are physically present within our territorial limits.

The claims of the present German government that all descendants of Germans wheresoever situated are German subjects is not a rule of international law but a wild fancy of the sabre-rattling individuals who hold the German nation in a vise of terror. These absurd claims do not establish dual citizenship or allegiance. In whatever light a foreign power views American citizens in America who are descended from ancestors who once inhabited the presently held terrain of the foreign power no sober-minded American citizen would entertain a motion that it vested foreign citizenship in him or gave the foreign power jurisdiction over him.

The Appellant Was Not Expatriated.

The international law to which the Court below adverted in its opinion to support its conclusion but which is in nowise supported by its citations has neither reality nor significance. Since 1924 the Japanese nationality law has provided that the only method

by which an American born Japanese can obtain rights to Japanese citizenship is by being registered at birth with a Japanese consular official. See *H. R.* 2124, p. 85, note 80. The appellant was never so registered. Such a registration, however, could not constitute dual citizenship. The act of registration by one's parents could not deprive a minor of citizenship in the United States and could not render him subject to the jurisdiction of the Japanese government. Our expatriation statute expressly disavows the claims of all foreign governments to the allegiance of our citizens. 18 *U. S. C. A.*, Sec. 800.

The appellant is a citizen of the United States and of the State of Oregon by birth by virtue of the *14th Amendment*. *U. S. v. Wong Kim Ark*, 169 U. S. 649; *Morrison v. California*, 291 U. S. 82. He is also declared to be a citizen and national of the United States by an Act of Congress. See the *Nationality Act of 1940*, 8 *U. S. C. A.*, sec. 501, which was formerly sec. 1, and sec. 601. The indictment admits and alleges the fact of his citizenship. (R. 3.)

In the *Expatriation Statute* which is now incorporated in the *Nationality Act of 1940* as *Title 8 U. S. C. A.*, sec. 800, but was formerly sec. 15 thereof, the United States expressly *disavows* the claims of foreign governments to the allegiance of American citizens and their descendants. It also vests in citizens the right to expatriation. A citizen by birth, however, cannot lose American nationality and citizenship except by one of the specific methods prescribed in the *Nationality Act*. See 8 *U. S. C. A.*, secs. 801, 803 and 808.

The appellant herein did not lose his nationality or citizenship by any of the methods therein described.

The expatriation statute does not enable a person to become a citizen of another country without being naturalized under the authority of the foreign state. *Elk v. Wilkins*, 112 U. S. 94, 28 L. Ed. 643, 5 S. Ct. 41. In view of this statute the consent of the government is not necessary for a citizen to expatriate himself if he follows its procedure but the consent of the foreign sovereign is necessary for him to acquire its nationality. *Jennes v. Landes* (CC-Wash.), 84 Fed. 73. The right of voluntary expatriation is inherent if the method pursued is one of those prescribed by the expatriation statute. *U. S. ex rel. Scimeca v. Husband* (CCA-2), 6 Fed. (2d) 957. Until October 14, 1940, when it was repealed, Title 8 *U. S. C. A.*, sec. 16, provided that, "No American citizen shall be allowed to expatriate himself when the country is at war." It is not improbable that this rule obtains as a rule of common law despite the repeal of the statute inasmuch as the country has the inherent and sovereign right to the services of its citizens during war periods.

If the citizenship of the native-born can be lost on such evidence as was introduced at the trial below what is to follow as the logical result of the precedent established? Simple suspicion could cost millions their citizenship. Our Jewish citizens could be considered Orientals owing a spiritual allegiance to Judaism and be decitizenized. The Catholic minority of our citizenry could be decitizenized because it admits a spiritual allegiance to Rome and the Church

of Rome has ever desired to dominate all States. The citizens professing a spiritual tie to the lesser Protestant denominations could be decitizenized. Each person lawfully entering the employ of a foreign power's representatives in this country could be decitizenized and the consent of our administration to their employment could not be pleaded in bar. The country would be filled with inhabitants who had been converted into aliens. If they could not be deported to a foreign country their presence here would be by sufferances. They would be deprived of civil rights and occupy the status of criminals. That the native-born should hold citizenship so insecurely and be subject to losing it on such evidence as was adduced at the trial below is utterly incredible and presents a problem of the gravest danger to American democracy. The opinion below must be repudiated and the judgment reversed.

THE NUANCES OF TRADITIONAL MORES.

What are these things called "race", the "nativity of his parents" and the "subtle nuances of traditional mores engrained in his race by centuries of social discipline" which the Court below, in its opinion (R. 46), declares bound the appellant to the Emperor of Japan. They are matters of the imagination. It appears, however, that they have been construed to penalize the appellant and to deprive him of citizenship.

The geographical situs of the nativity of the parents of the appellant could have no bearing on any issue involved herein and must be disregarded. His parents, although born in Japan, have resided the greater portion of their lives in the United States where their children were born, reared, educated and employed. America sustains them and they in turn contribute their industry and services to its welfare. This family and its ties are typically American as the record demonstrates.

Heredity Versus Environment.

The appellant's "*race*" and the "*subtle nuances of traditional mores engrained in his race by centuries of social discipline*" are fictional. The word *subtle* means crafty and the word *nuances* means shades of color but as used by the Court it signifies shades of mind. The word *mores* means customs, conventions or manners. The Court's charge is, therefore, that the appellant is bound to the Emperor of Japan by "*race*" and the "*crafty mental shades of traditional customs engrained in his race by centuries of social discipline*". The charge is absurd. The Court below failed to appreciate the distinction between matters of heredity and matters of environment.

Anatomical structure and physiological function are things of heredity. Mental stability and qualities are derived from environment. Pathological conditions and psychoses may impair mental stability and qualities but these disorders are environmental and not things of an inherited nature. The brain structure is congenital and derived from heredity but the mind

with its faculties is the product of environment. The mind contains nothing of race and is not atavistic. The instincts are propensities prior to experience and independent of instruction and training. They are reflexive actions of a preservative nature characteristic of all animal life from the protoplasm upward in the evolutionary cycle. They are not things peculiar to any zoological phyla, order, class, genus or species. Were a human after birth deprived of nearly all environmental experience its brain would develop structurally but its actions would never intrude beyond the instinctive stage. The human mind is a blank at birth but it is plastic and impressible. What is subsequently impressed thereon and thereafter resolved into expression as thought is but a reflection of environment and not of heredity. There is no such thing as race instinct resulting in engrained mental nuances of traditional mores. The social traditions of one's ancestors were environmental factors acquired by them and peculiar to them but they are not experiences of an inheritable nature transmittable to descendants.

The environment of the appellant was characteristically American. The whole of the record gives a vivid picture of a young man loyal and devoted to this country and eager to be of whatever service this Nation might require. If the "subtle nuances of traditional mores" which the Court below assigned to him as hereditary factors had a factual basis not only the appellant but all mankind today would think and act in the precise patterns of ancestors, as primi-

tive man, and not at all as civilized or modern man. If these strange mores were farther traced their origin would have to be found in the first protoplasmic bodies inhabiting the waters of the earth and exhibiting all the symptoms of instinctive reaction to stimuli and none of the mind. Animal life would never have evolved beyond the protozoic stage. The struggle of man has been upward by his individual reaction to his environment. He doesn't come into the world with the customs, conventions, manners, mores or social discipline of his ancestors engrained in his mind or attached to him as mental or physical appendages. The descendants of medieval knights are not born with the chivalric code of honor engrained in their brains and their bodies encased in suits of armor.

Race Versus Nationality.

The Court below conceived of race as something of which it peculiarly had judicial knowledge or took judicial notice in the absence of any evidence adduced thereon. Its concept was contrary to all known anthropological facts. Its conception of race was that it was a vague hereditary something imprinting all individuals at birth with the markings of special ancestral types. It believed these types derive structural and mental peculiarities traceable to remote ancestors or primitive but distinct prototypes in an unbroken and unpolluted blood line to which all descendants necessarily conform physically and mentally. It also believed the descendants owe allegiance by virtue of race

to the sovereigns of one's ancestors without considering that in the migrations and peregrinations of one's ancestors various sovereigns of diverse states may have claimed suzerainty over sundry ancestors. Allegiance is not a matter of heredity but a matter of jurisdiction dependent upon environment. It is odd too that by a process of mental gymnastics the trial Court assumed, without any supporting evidence, that the appellant's grandparents and ancestors for centuries were Japanese subjects for it asserts that mores were engrained in the appellant's race by centuries of social discipline. Whether or not the appellant's ancestors were for centuries subjects of Japanese Emperors the "social discipline" of his ancestors could not be other than those acquired environmental habits peculiar to those so disciplined. Inasmuch as their social conduct sprang from somatic brain cells and not from generative germ-cells which are the bearers of heredity their social habits were not transmittable hereditary responses. The habits acquired by each individual are peculiar to him and are not derived either from lineal or collateral ancestors but from environment. Neither the place of nativity of one's parents or ancestors nor the ethereal nuances of traditional mores which the Court below mentions could possibly have any effect whatsoever upon a person's allegiance which is a thing of nationality springing from sources quite different.

The Court below seems to have considered race a determiner of allegiance to a country and nation. The conceit of race is a species of vanity. It has been said

that if you scratch a Russian you expose a Tartar. It might also be said that if you scratch any white man you expose his Tartar ancestry for there is Mongol blood in addition to many other darker types of ancestral blood flowing in the veins of every white man. From antiquity to modern times great hordes of men have spread over the face of the earth and great mass movements are taking place today. The result has always been and perhaps always will be the intermingling and interbreeding of peoples of all colors regardless of their geographical origin and that of their ancestors. No individual alive can truthfully assert that the color of his skin is a guarantee of freedom from the blood of ancestors whose skins were of coloration other than his own. Any reputable anthropologist and ethnologist would readily admit that every individual alive has traces of blood derived from ancestors of every conceivable type of skin pigmentation and that these ancestors came from every region of the earth. Could we view the recessive colorations which are overshadowed by the dominant ones in each individual those who pride themselves on being pure whites would indeed suffer a shock. The transmission of skin coloration to progeny as an incident of physical structure does not create races. What are popularly supposed to be races is a delusion. Nationality has reality. Peoples throughout the world are properly classifiable by *nationality* and by no other means. Citizenship is a product of nationality and, under a democratic constitutional government, is not a thing of degrees.

CONCLUSION.

The opinion of the Court below was correct only in so far as it held that the statute and proclamation involved herein were inapplicable to citizens. It is erroneous in that it operates to deprive the appellant of citizenship without an iota of evidence that he renounced or lost American citizenship and without a scintilla of evidence of any allegiance upon his part to Japan. Contrary to the whole of the evidence introduced at the trial below the Court decided the appellant to be an alien enemy. The judgment is in nowise supported by the evidence. It is in nowise supported by the reasoning couched in the opinion of the Court below. It should be reversed.

Dated, San Francisco,

February 17, 1943.

Respectfully submitted,

WAYNE M. COLLINS,

Amicus Curiae.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

FEB 13 1948

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CLERK

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

**STATEMENT OF THE PLEADINGS AND FACTS
DISCLOSING BASIS OF COURTS'
JURISDICTION.**

The appellant was indicted in the District Court of the United States for the District of Oregon for a violation of Public Proclamation No. 3 of the Western Defense Command, and Public Law No. 503, 77th Congress, approved March 21, 1942. He entered a plea of not guilty and after trial was convicted and sentenced to pay a fine of Five Thousand (\$5,000.00) Dollars and be imprisoned for a term of one year. Public Law No. 503 is codified as Title 18, U.S.C.A., Section 97A, and the indictment is set forth on pages 2-5 of the record in this case.

At the conclusion of all the evidence in the case the appellant interposed a motion for a verdict and judgment of not guilty which raised the question of the sufficiency of the indictment for the reason that it was not charged that appellant was an alien Japanese but appeared therefrom that the appellant was a citizen of the United States of America. The motion raised further the question of the validity of the statute mentioned above and of Executive Order No. 9066, and of Public Proclamation No. 3 of the Western Defense Command, all of which are hereinafter set forth. The appellant contended not only that the indictment alleged but that the proof showed he was a citizen of the United States of America and that the laws and proclamations mentioned were void as to citizens of the United States of America.

The Court overruled the various motions of the appellant and held that the regulations were void as to citizens of the United States of America and held that the appellant was not a citizen of the United States of America but of Japan.

Exceptions were duly saved by the appellant to the ruling of the Court denying the defendant's motion for a verdict and judgment of acquittal and to the findings of the Court to the effect that the defendant was not a citizen of the United States of America but of Japan and the exceptions were allowed by the Court. (R. 88-90) Thereafter the appellant duly prosecuted this appeal.

The District Court of the United States for the District of Oregon had jurisdiction of the case pursuant to the provisions of Title 28, U.S.C.A. Sec. 41, Subdivision 2, and the Circuit Court of Appeals for the Ninth Circuit has jurisdiction upon the appeal pursuant to the provisions of Title 28, U.S.C.A.

STATUTES, EXECUTIVE ORDERS AND PROCLAMATIONS, THE VALIDITY OF WHICH IS INVOLVED.

Public Law No. 503, 77th Congress, Title 18, U.S. C.A. Sec. 97A, is as follows:

“Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.”

Executive Order No. 9066, the validity of which is involved in this suit, was dated February 19, 1942, and appears in Vol. 7, No. 38, Page 1407 of the Federal Register of February 25, 1942. It reads as follows :

“Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104) :

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation,

food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restrictive areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

Public Proclamation No. 1, the validity of which is involved, is dated March 2, 1942, and establishes military areas Nos. 1 and 2. (R. 51-68.)

Public Proclamation No. 3, which was promulgated March 24, 1942, the validity of which is involved in this case, is as follows:

"HEADQUARTERS
WESTERN DEFENSE COMMAND
and FOURTH ARMY
Presidio of San Francisco, California
PUBLIC PROCLAMATION NO. 3

March 24, 1942.

TO: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

WHEREAS, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

WHEREAS, by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

WHEREAS, the present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

NOW, THEREFORE, I, J. L. DE WITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned:

1: From and after 6:00 A.M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits

of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proc-

lamations Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: 'An Act to Provide a Penalty for violation of Restrictions or Orders with respect to Persons Entering, Remaining in, Leaving, or Committing Any Act in Military Areas or Zone.' In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

5. By subsequent proclamation or order there will be prescribed those classes of persons who will be entitled to apply for exemptions from exclusion orders, hereafter to be issued. Persons granted such exemption will likewise and at the same time also be exempted from the operation of the curfew regulations of this proclamation.

6. After March 31, 1942, no person of Japanese ancestry shall have in his possession or use or operate at any time or place within any of the Military Areas 1 to 6 inclusive, as established and defined in Public Proclamations Nos. 1 and 2, above mentioned any of the following items:

- (a) Firearms.
- (b) Weapons or implements of war or component parts thereof.
- (c) Ammunition.
- (d) Bombs.
- (e) Explosives or the component parts thereof.
- (f) Short-wave radio receiving sets having a frequency of 1,750 kilocycles or greater or of 540 kilocycles or less.
- (g) Radio transmitting sets.
- (h) Signal devices.
- (i) Codes or ciphers.
- (j) Cameras.

Any such person found in possession of any of the above named items in violation of the foregoing will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone.'

7. The regulations herein prescribed with reference to the observance of curfew hours by enemy aliens, are substituted for and supersede the regulations of the United States Attorney General

heretofore in force in certain limited areas. All curfew exemptions heretofore granted by the United States Attorneys are hereby revoked effective as of 6:00 a.m., PWT, March 27, 1942.

8. The Federal Bureau of Investigation is designated as the agency to enforce the foregoing provisions. It is requested that the civil police within the states affected by this Proclamation assist the Federal Bureau of Investigation by reporting to it the names and addresses of all persons believed to have violated these regulations.

J. L. DEWITT

Lieutenant General, U. S. Army
Commanding"

STATEMENT OF THE CASE

The appellant was born at Hood River, Oregon, on October 19, 1916. His father and mother were both residents and inhabitants of that place, the father being engaged in business as a merchant and the mother as a housewife. Neither were in the diplomatic service of any country. (R. 77, 148-150.) The appellant's birth was recorded in the birth records of the State of Oregon at that time and his birth has never been recorded in any other place. The father continued to engage in business as a merchant and in farming pursuits at Hood River until he was interned after the declaration of war with Japan.

The appellant has never resided at any place except in the United States. When he was about eight years old his parents took him on a short trip to Japan to visit his grandparents, leaving in June and returning the following September. Except for this short vacation and for a portion of a day spent in Mexico, the appellant has never been outside of the United States of America. He has never received from or given to the Government of Japan any questionnaire or information as to himself.

The appellant was educated in the primary and high schools at Hood River. He entered the University of Oregon in 1933, started the study of law in 1936, received his Bachelor of Arts degree from the University of Oregon in 1937, and was graduated from the School of Law in June, 1939. In the meantime he had earned a commission as second lieutenant in the United States Army and on arriving at the age of majority he took an oath of allegiance to the United States of America and received his commission. He was admitted to the bar of Oregon in September, 1939, and practiced law at Hood River and Portland, Oregon, until April, 1940. He voted as an American citizen.

In April, 1940, the appellant secured employment in the office of the Consulate General of Japan at Chicago, Illinois. The necessary papers were filed with the Secretary of State wherein was set forth that he was an American citizen. He never took any oath of allegiance to Japan and his duties consisted of opening the mail, typing answers thereto, and making

speeches before civic clubs. His salary was \$125.00 per month. On December 8, 1941, he resigned his employment with the Consulate General and immediately tendered his services to the United States Army.

On the 28th day of March, 1942, the appellant violated the so-called Curfew Regulations contained in Public Proclamation No. 3. For this he was indicted and on the trial contended that the indictment was defective in that it failed to charge a crime and did not allege that he was an alien Japanese. He further contended that the proof showed he was a citizen of the United States of America and that the regulations which he was charged with violating were void as to citizens of the United States of America and more particularly as to him in that they deprived him of liberty and property without due process of law and failed to grant him equal protection of the law and illegally discriminated against him as a citizen of the United States of America and failed to grant him the privileges and immunities which attached to him as such. These questions were raised by a motion at the conclusion of all of the evidence of the case for a verdict and judgment of not guilty. The trial Court overruled the motion, holding that the regulations which the appellant was charged with violating were void as to citizens of the United States of America but holding that the appellant was not a citizen of the United States of America, but of Japan. The appellant saved exceptions to the action of the Court in denying his motion and objected and excepted to the findings of the Court that the appellant was a citizen of Japan and was not

a citizen of the United States of America, and objected and excepted to the Court finding the defendant guilty and to the imposition of any sentence against him.

The questions involved in this appeal arise by reason of the rulings and exceptions aforesaid. The questions involved are:

First: Is the indictment defective in failing to allege that the defendant was an alien Japanese?

Second: Does the evidence taken at the trial show that the defendant was a citizen of the United States of America?

Third: Does the evidence in the trial show, beyond a reasonable doubt, that the defendant was a Japanese alien?

Fourth: Does the finding of the court that the defendant is not a citizen of the United States, deprive him of his guaranty of citizenship under the Fourteenth Amendment of the Constitution of the United States?

Fifth: Does Public Proclamation No. 3, and particularly the provisions therein establishing hours of curfew and the regulations pertaining thereto, deprive the defendant of his liberty and property without due process of law?

Sixth: Does Public Proclamation No. 3, and particularly the provisions therein establishing hours of curfew and the regulations pertaining thereto, deprive the defendant of equal protection of the laws?

Seventh: Does Public Law No. 503, 77th Congress, deprive the defendant of his liberty and property without due process of law?

Eighth: Does Public Law No. 503, 77th Congress, deprive the defendant of the equal protection of the laws?

Ninth: Does Executive Order No. 9066 deprive the defendant of his liberty and property without due process of law?

Tenth: Does Executive Order No. 9066 deprive the defendant of the equal protection of the laws?

SPECIFICATIONS OF THE ASSIGNED ERRORS TO BE RELIED UPON.

The errors assigned and to be relied upon are as follows:

Assignment No. 1. (R. 218) The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that

the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

Assignment No. 2: (R. 218) The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is a citizen of the United States.

Assignment No. 3. (R. 219) The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

Assignment No. 4. (R. 219) The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States

of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that there is no evidence that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

Assignment No. 5. (R. 219-220) The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but alleges facts sufficient to show that the defendant at all times has been a citizen of the United States of America.

These assignments raise the following contentions of the appellant which will be presented in the argument in the order named.

First: The indictment fails to state a crime for the reason that there is no allegation that the appellant is an alien Japanese.

Second: The evidence in the case was insufficient on which to base a finding that the defendant was an alien Japanese but, on the contrary, required a finding that the defendant was a citizen of the United States of America.

Third: The finding of the court that the defendant is not a citizen of the United States of America deprives him of his guarantee of citizenship under the Fourteenth Amendment to the Constitution.

Fourth: Public Proclamation No. 3 of the Western Defense Command, and particularly the provisions thereof establishing hours of curfew and the regulations pertaining thereto, and Public Law No. 503, 77th Congress, insofar as it applies to the proclamation, are void as to American citizens of Japanese ancestry and particularly to the appellant, for the reason that they deprive such American citizens and particularly the appellant of liberty and property without due process of law.

Fifth: Public Proclamation No. 3 of the Western Defense Command, and particularly the provisions thereof establishing hours of curfew and the regulations pertaining thereto, and Public Law No. 503 as applied to the Proclamation, are void as to American citizens of Japanese ancestry and particularly the appellant, for the reason that they deny such American citizens and particularly the appellant of equal protection of the laws.

Sixth: Executive Order No. 9066 is void for the reason that it denies to American citizens, and particularly the appellant, due process of law and the equal protection of the laws.

ARGUMENT

The indictment does not charge that the Defendant is an alien Japanese and, therefore, fails to state a crime and would not support a finding that the defendant is an alien Japanese.

Public Proclamation No. 3 purports to require all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing within the geographical limits described to be within their place of residence between the hours of 8:00 P. M., and 6:00 A. M., which period is referred to as the hours of curfew. It is apparent from the proclamation itself that alien Japanese are considered as a class distinct from persons of Japanese ancestry, and that persons of Japanese ancestry are not included in the classification relating to alien Japanese.

The indictment does not charge that the defendant is a Japanese alien but the allegation is, "that Minoru Yasui is a person of Japanese ancestry: that he was born at Hood River, Oregon, on the 19th day of October, 1916." This indictment did not inform the defendant that he would be called upon to defend against the charge that he was a Japanese alien. On the contrary, citizenship being the rule and alienage the exception, the presumption would be, from the allegation of birth in the United States, that appellant is a citizen of the United States. To charge a crime, it would be necessary to state facts from which the court

could draw a conclusion, as a matter of law, that appellant is an alien Japanese.

An indictment must be direct and certain as to the crime charged and the particular facts and circumstances when such are necessary to a complete offense. All the material facts and circumstances embraced in the definition of the offense must be stated in the indictment and the omission of any essential element cannot be supplied by intendment or implication. (See *U. S. vs. Standard Brewery*, 251 U.S. 210, 220; 64 L. Ed. 229, 435; 40 S. Ct. 139.) Allegations of essential elements of a statutory offense are matters of substance and not of form and their omission is not aided or corrected by verdict. (*Harris vs. U. S.*, C.C.A. Mo. 1939, 104 Fed. (2d) 41).

The court cannot say from an inspection of the indictment that the defendant is charged with being an alien Japanese. On the contrary, it would appear by the indictment that the appellant is an American citizen. Inasmuch as the lower court found that Public Proclamation No. 3 was void as to American citizens of Japanese ancestry, it necessarily follows that to state a crime under Public Law No. 503, 77th Congress, and Public Proclamation No. 3, it would be necessary to allege that the defendant was an alien Japanese. Inasmuch as the indictment does not so allege it cannot be the basis of a finding that the defendant is an alien Japanese and does not in fact state any crime at all.

The evidence in the case required a finding that the appellant is a citizen of the United States.

The appellant was born in the United States of America at Hood River, Oregon, on the 19th day of October, 1916. (Government Exhibit 7. R. 77, 148.) At that time the defendant's father was engaged in business at Hood River, Oregon, as a merchant and his mother was a housewife and both of his parents were residents and inhabitants of that place. Neither of the parents were in the diplomatic service of any country. Clearly then, the defendant on his birth became a citizen of the United States of America. "All persons born * * * in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside." Amendment XIV, Constitution of the United States. A person born in the United States, of alien parents who are regularly domiciled in the United States and who are not engaged in diplomatic service, is a citizen of the United States. (See *U. S. v. Wong Kim*, (Ark.) 169 U.S. 649, 42 L. Ed. 890, 18 S. Ct. 456; *Morrison v. Cal.*, 291 U.S. 82, 85.)

The opinion of the trial court (R. 46-47), while admitting the fact of the appellant's citizenship by birth, says:

"By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of

election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor * * *."

No authority is quoted in support of the first statement. In support of the second, cases are cited where children, born in this country of alien parents, were taken by the parents to their native land and where the children, by reason of years of residence in such land became subject to the jurisdiction thereof. A third case is cited where a person naturalized in this country returned to his native land and reassumed his allegiance to it. The appellant in the case at bar denies that by international law he was a citizen of Japan or a subject of the Emperor of Japan, denies that according to international law he had, upon attaining majority, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor, and asserts that at all events, if he was required to make an election, he at all times elected to be and remain a citizen of the United States of America by repeated acts and by most solemn declarations.

No evidence was offered at the trial that the appellant was ever a citizen of Japan. No reference or authority was cited that by international law he was considered as such. Allegiance is a necessary concomitant of citizenship. Double allegiance arises from the conflict of two nations, each superior within its own borders. The conflict is obviated by the rule that the liability of the child to the performance of the duties of allegiance is determined by the laws of that

one of the two countries in which he actually is. Moore, *International Law*, Vol. 3, Sec. 428, p. 518. The cases referred to by the trial court deal with children born in the United States, who were later removed to the birth place of their parents. In these cases the foreign nation could assert its citizenship law against the individual by reason of the individual's continued residence within its borders. Such is not the case at bar, for the appellant and his parents have continuously resided within the United States of America.

It is a contemptible concession to the power of any foreign government to say that such government can command allegiance to it from a person not only born in the United States of America but a continual resident and inhabitant thereof. It is a pernicious doctrine which asserts that a child born in the United States, of alien parents regularly domiciled therein, who continues with his parents to remain a resident and inhabitant of the United States, owes any allegiance to the land of his parents or has an inchoate right of citizenship therein during his minority. It permits a foreign government to add a proviso to the Fourteenth Amendment to the Constitution of the United States of America. It demands of all citizens of the United States, born of alien parentage, duties of election heretofore unknown. No natural born citizen of of the United States of America can owe any allegiance to or have citizenship in any foreign government unless he has voluntarily expatriated himself in the manner provided by law.

It is unquestioned that the appellant was born on the 19th day of October, 1916, at Hood River, Oregon, (R. 77, 148) and therefore he reached the age of majority on October 19, 1937. (O.C.L.A., Sec. 63-501.) The record of his birth was filed with the Oregon State Board of Health and was never recorded in any other place. (R. 150.) His father continued in business at Hood River, Oregon, throughout the years and his mother continued to there reside as a housewife. The only time the appellant has been outside of the United States, with the exception of four hours spent in Mexico, was in 1925 when he was taken on a short vacation trip to Japan in the summer months. (R. 151-152.) He never resided in any foreign country. (R. 153.) He attended the public schools in Hood River and entered the University of Oregon in 1933. He received his Bachelor of Arts Degree in 1937. (R. 153-154.) While attending the University of Oregon he took a military course which was unquestionably *not* compulsory. He completed this course in June, 1937. *Inasmuch as he had not then reached the age of majority he was not granted his commission in the United States Army until December 1937, at which time he then, having reached the age of majority, took an oath of allegiance to the United States of America.* (R. 174) If an election as to citizenship was necessary, here it was made in the most solemn manner. When such an election is made it is final. (Moore, International Law, Vol. 3, Sec. 430, pp. 545-546.)

In June, 1939, the appellant completed his law course at the University of Oregon. He returned to

Hood River County and worked in the summer time as a ranch hand and, in September of 1939, passed the bar examinations and was admitted to practice in the State of Oregon. (R. 155.) To secure his license it was necessary that he be a citizen of the United States of America and that he take an oath of office to support the Constitution and laws of the United States. (Sec. 47-302 and 47-306, O.C.L.A.)

He never took an oath of allegiance to any country save the United States of America and exercised the rights of citizenship by voting in the State of Oregon. (R. 154, 157.) The appellant's parents are Methodists, (R. 196) and the only Japanese organizations with which he was connected were the Japanese Methodist Church and the Japanese American Citizens League. (R. 178, 196.)

After admission to the bar he practiced law until April, 1940. At that time the appellant secured employment as a secretary in the office of the Consulate General of Japan at Chicago, Illinois. Along with all other employees, he was required to be registered with the Secretary of State at Washington, D. C., and in his registration his nationality was given as United States citizen. (R. 59) His salary was \$125.00 per month and his duties consisted of opening and answering mail and making speeches before civic clubs. He had hoped to bring about better relations between the United States and Japan. (R. 181-182), did nothing detrimental to the United States of America, R. 191), and there is not a scintilla of evidence that dur-

ing the time he was employed with the Consulate General's office he did any act or said anything inconsistent with his citizenship in or allegiance to the United States (R. 151), and he did nothing which would bring about his expatriation, (R. 172-174, U.S. C.A., Title 8, Sec. 801.)

On December 8, 1941, the appellant resigned his position in the Consulate General's office because he felt that as a loyal American citizen he could not be working for the Japanese Consulate after the declaration of war. (R. 160). He immediately and repeatedly offered to go into active service in the United States army. (R. 84-86). Under date of March 28, 1942, (R. 85-86) he was notified that a physical defect, defective vision, would be waived for limited service and that he would be retained in the Infantry Reserve with eligibility for limited service only.

The appellant's employment by the Consulate General's office is one of the two things referred to in the opinion of the trial court as a basis for a finding that he was a citizen of Japan. Subdivision D of Title 8, Sec. 801, U.S.C.A., provides that a United States citizen shall lose his nationality by accepting or performing the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof, *for which only nationals of such state are eligible*. It is not claimed that the duties of the appellant's employment could only be performed by Japanese Nationals. There were other American citizens employed in the department. How could the

citizenship in the United States, which the appellant had held for twenty-three years, be affected by his acceptance of this employment which was not confined to Japanese Nationals? As heretofore pointed out, the record in the case lacks any evidence that appellant's duties required him to do anything inimical to the interests of the United States of America or anything contrary to the oath of allegiance to the United States which he had taken over two and one-half years before. If he had been able to carry out his desire to preserve friendly relations between his country and Japan he would have earned the gratitude of all Americans. That he was unable to do so is no reason for damning him after the event by depriving him of the American citizenship which is his birthright.

The other circumstance referred to by the trial court is that the appellant's father, in 1940, received some recognition from the government of Japan. The only evidence in the record is that such recognition was given because of the work Mr. Yasui, Sr., had done in promoting better relations between the Japanese and Americans in the Hood River Valley. If the government contends that such recognition was granted for more sinister reasons and that a penalty should be visited on the son, it was in a position to produce what it claimed to be the facts. Instead, it produced nothing. The writers of this brief are not here called upon to defend the appellant's father. If we were we would first have to ask the nature of the charge, for none is suggested. Innuendo is not evidence. It is in the record, however, that on the night of December

8, 1941, the appellant received a telegram from his father reading as follows:

“As war has started your country needs your services as a United States Reserve Officer. I as your father strongly urge you to respond to the call immediately.” (R. 83)

The right to citizenship in the United States is precious to the appellant, but the question raised on this feature of the case goes far beyond his own personal interests. In this country are millions of persons born here of alien parentage who know no country but this. The appellant is one of them. These people, from early childhood, have learned in the schools to daily “pledge allegiance to the flag of the United States of America and to the country for which it stands, *one nation indivisible*, with liberty and justice for all.” They have been taught that the United States is the one country where all men are born equal and where no person will ever be discriminated against because of religion, race or color. They have learned that this, and this alone, is their country. To them, and remember that the appellant is one, double allegiance and the right of election between conflicting citizenships, are unknown. This country should reject any idea that a child born here of alien parentage, who remains here with his parents until reaching the age of majority, owes the faintest trace of allegiance to any foreign government or can throw off at will his allegiance to the country that has sheltered, protected, and educated him from the cradle to manhood.

The effect of the decision of the trial court is to deprive the appellant of the right of citizenship which he acquired by birth, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Public Proclamation No. 3 of the Western Defense Command is void as depriving citizens of liberty and property without due process of law.

The Fifth Amendment to the Constituion of the United States provides :

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Executive Order No. 9066, referred to in the indictment and heretofore set forth in full, after reciting that the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense materials, national defense premises and national defense utilities as defined by statute, authorized the secretary of war

and military commanders designated by him to prescribe military areas in such locations and of such boundaries as might be desired from which any or all persons might be excluded and subject to such restrictions as might be imposed upon the right of persons to enter, remain in, or leave such areas. Lt. General John L. De Witt was designated by the secretary of war to exercise for the Western Defense Command the authority granted by Executive Order No. 9066.

Claiming to act pursuant to the authority so vested in him, General De Witt, by Public Proclamation No. 1, on March 2, 1942, designated certain military areas and military zones. On March 21, 1942, Public Act No. 503 was passed by Congress and approved by the President. On March 24, 1942, Public Proclamation No. 3 was issued by General De Witt requiring all alien Japanese, all alien Germans, all alien Italians and all persons of Japanese ancestry residing within the limits of the military areas and zones theretofore established to be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period was designated as the hours of curfew.

The appellant, an American citizen, was arrested for being away from his place of residence during the so-called curfew hours. It will be noted that Executive Order No. 9066 contains a recital that the successful prosecution of the war requires every possible protection against espionage and sabotage. This is the purported excuse for the authority granted to the secretary of war and military commanders. Of neces-

sity, then, this must be the only excuse for the issuance of Public Proclamation No. 3, and the arrest of the appellant for violating it. In the final analysis the military commander ordered the appellant and others of his class to be confined to their homes during the hours specified without accusation or opportunity to be heard on a suspicion that he and others of his class might be inclined to espionage or to the commission of sabtotage. Every fundamental right embraced within the due process clause was violated and this for the sole reason that the United States is at war.

It will be noted that the first clause of the Fifth Amendment to the Constitution of the United States, that relating to indictment, etc., makes an exception in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. No such exception is reserved in the later provisions of the Amendment. The amendment does not say that no person shall be deprived of liberty or property without due process of law except in time of war, but does say, *without limitation*, that no person shall be deprived of liberty or property without due process of law.

A state of war does not suspend the operation of constitutional limitations. The existence of war does not suspend the guarantees of the Fifth and Sixth Amendments to the Constituion relating to personal equality, due process of law and taking private property for public use. (67 C.J. 366, Sec. 56, U. S .v. Cohen Grocery Co., 255 U.S. 81; Ex parte Milligan,

71 U.S. 2, U. S. v. Bernstein et al., 267 Fed. 295.)

In *ex parte Milligan*, *supra*, a citizen of the United States who had been tried, convicted and sentenced to death by a military court for conspiracy and subversive measures against the Federal government, applied for habeas corpus. He was a citizen of the State of Indiana which, although it had been previously invaded and was threatened with invasion, was not at the time under occupation by any hostile troops. The opinion deals exhaustively with the law of civil and military power and, after setting forth the provisions of the Fourth, Fifth and Sixth Amendments to the Federal Constitution, the court said:

“ . . . These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

“Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought

to be avoided. Those great and good men foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.

“The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.”

Answering the claim that the jurisdiction complained of was justifiable under the laws and usages of war the Court, among other things, said:

“If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military depart-

ments for more convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

“The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually render the ‘military independent of an superior to the civil power’—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irrenconcilable; and, in the conflict, one or the other must perish.

“This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to

human liberty are frightful to contemplate.

“If our fathers had failed to provide for just such a contingency, they would have been false to the trust imposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time has proved were essential to its preservation. Not one of those safeguards can the President or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.”

The *Milligan* case was cited with approval in *Sterling v. Constantin et al.*, 278 U.S. 378. The case was a suit to enjoin the Governor of the State of Texas, the Adjutant General of the State, and the Brigadier General of the Texas National Guard from enforcing certain military or executive orders. The executive and military orders were based on a proclamation of the Governor stating that certain counties were in a state of insurrection, tumult, riot, and a breaching of the peace and declaring martial law. The Court held that the allowable limitations of military discretion and whether or not they have been overstepped in a par-

ticular case are judicial questions, and, after citing the Milligan case and quoting from that portion of it which we have set out above, the Court sustained the issuance of an injunction against the defendant.

Emergency does not create power nor diminish constitutional restrictions. (See *Home Building Association v. Blaisdell*, 290 U.S. 426; *Schechter v. U. S.*, 295 U.S. 495) and the war power of the United States is subject to applicable constitutional limitations. (See *Hyland v. Russell*, 279 U.S. 253; *Hamilton v. Kentucky Distilleries*, 251 U.S. 146.

In the lower court the prosecution sought to justify Public Proclamation No. 3 by saying that it was merely a mild regulation requiring those affected by it to stay at home during certain hours and that the present state of the nation's affairs require that constitutional guarantees be redefined. These claims sound foreign to those who were raised to applaud Patrick Henry's immortal declaration that liberty is preferable to death. In the Milligan case, the military authorities at least gave him a trial but in the case at bar the military did not even go through that formality before condemning the appellant to imprisonment ten hours each day. This so-called mild invasion of the constitutional right to liberty was the first step step that led to the disgraceful situation where American citizens, charged with no offense except that of ancestry, are imprisoned behind barbed wire by the fiat of the military authority, while aliens of enemy countries are permitted by that same authority to be

at large. This is not a redefining of constitutional rights, it is an undermining of those most sacred to Americans. The trial court held that Public Proclamation No. 3 is void as beyond the power of the military authorities. The opinion of the court is set forth on pages 13-50 of the record, and is such a complete answer to the power claimed by the military authorities that the writers of this brief can add nothing to it. In the absence of a declaration of martial law the civil law and the constitutional guarantees are supreme. There is no middle ground between government by law and martial rule. (67 C.J. 425, Par. 186 et seq. *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 270.) The civil authorities, federal, state, and municipal, in the military zones established by the Western Defense Command are functioning as fully and completely as if the United States was not engaged in a war. All the courts are open, no part of these zones is or has been invaded by the enemy. In these circumstances if citizens are to be subjected to the arbitrary dictates of a military commander, then, as said in the *Milligan* case, *supra*, "republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the constitution"

Public Proclamation No. 3 is discriminatory, deprives American citizens of the equal protection of the law.

There is a more pernicious vice inhering in Proclamation No. 3 of the Western Defense Command. The

curfew provisions of the proclamation are directed against all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry. The proclamation is not directed against all citizens of the United States of America, nor against all citizens of the United States of America of German, Italian and Japanese ancestry. Of all American citizens, those of Japanese ancestry are arbitrarily selected by the military commander and placed in a classification with enemy aliens. No provision was made for a hearing by any American citizen of Japanese ancestry to determine whether such person was liable to commit acts of sabotage or engage in espionage. A greater insult to the loyalty of American citizens of Japanese ancestry could not have been devised. The insult was sweeping and complete.

As far as the writers of this brief are able to determine, this proclamation constitutes the first attempt on the part of any agency of the federal government to discriminate or legislate against a group of American citizens merely because of ancestry. It has always been the boast of this country that all citizens are equal before the law. For the first time in American history, persons born in the United States and citizens thereof are not treated as Americans. The theory is advanced that this nation which is supposed to be indivisible is composed of English Americans, Chinese Americans, German Americans, Italian Americans, Russian Americans, and foreign Americans of all classes. One of the vices of the proclamation is that

it fails to deal with the people as citizens and purports to suspect and punish them on the sole ground of ancestry.

In the lower court the prosecution contended and no doubt will contend in this court that the Fifth Amendment contains no equal protection clause. This, however, is a far different thing than saying that due process in and of itself does not protect citizens in their fundamental right to be dealt with equally with other citizens. This is recognized even in the cases which were cited by the prosecution. Thus, in passing upon the power of Congress to regulate commerce the court in *Currin v. Wallace*, 306 U.S. 1, 14, said:

“If it be assumed that there might be discriminations of such an unjust character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce powers renders the action of Congress invalid.”

The restraint imposed upon legislation by the due process clause of the Fifth and Fourteenth Amendments is the same, *Heiner, Collector of Internal Revenue v. Donnan*, 285 U.S. 312; *Collidge v. Long*, 282 U.S. 582. No duty presses more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of right which is the foundation of free government. *Gulf, Colo. & Santa Fe Railway Co. v. Ellis*, 165 U.S. 160.

The essentials of due process were set forth in

Truax v. Corrigan, 257 U.S. 312, 333, 66 L. Ed. 254.

“The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general laws, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general laws which govern society. *Hurtado v. Cal.*, 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone’s right of life, liberty, and property, which the Congress or the legislation may not withhold. Our whole system of law is predicated on the general fundamental plan of equality of application of the law. ‘All men are equal before the law’, ‘This is a government of laws and not of men’, ‘No man is above the law’, are all maxims showing the spirit in which legislators, executives, and courts are expected to make, execute and apply laws.”

The prosecution cited a class of cases such as those dealing with the constitutionality of the milk act, the bituminous coal act, the tobacco inspection tax act, the social security law, the income tax law and the conscription act, as an argument that the United States government may adopt such classifications as it deems proper. We have no quarrel with any of these decisions, but would anyone say, for instance, that a court

would uphold the validity of a conscription act which said that no persons, except American citizens of Japanese ancestry, would be drafted into the United States army? The distinction is so fundamental that a mere statement of it would seem to show the inapplicability of the cases cited by the government.

All persons within the jurisdiction of the United States shall have the same right in every state and territory. . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to ^{light} ~~light~~ ^{KE} punishments, penalties, taxes, licenses and exactions of every kind, and no other. 8 U.S.C.A., Par. 41. A regulation which forbids citizens of one ancestry or color to do things which citizens of another ancestry or color are permitted to do, does not afford due process of law or equal protection of the law. *Buchanan v. Worley*, 245 U.S. 60; *Truax v. Raich*, 239 U.S. 35; *Yick Wo v. Hopkins*, 118 U.S. 356; *Yu Chong Eng et al. v. Trinidad et al.*, 271 U.S. 500. *Re Opinion of the Justices*, 207 Mass. 601, 94 N.E. 558.

The case of *Yick Wo v. Hopkins*, *supra*, involved the invalidity of ordinances of the city of San Francisco regulating the location and operation of laundries. Under the ordinances any persons seeking to operate a laundry were required to obtain a license from a board of supervisors. The operations of the supervisors under these ordinances was such that a large number of Chinese were denied the right to conduct laundries, while people of other nationalities in

similar circumstances were granted licenses. Mr. Justice Mathews, in the course of his opinion, said:

“They” (the ordinances) “seem intended to confer and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons”. . . .

“The power granted to them is not confined to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint.” Page 366.

“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution.” Pages 373-4.

In *Buchanan v. Worley*, *supra*, the court said:

“That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration may be freely admitted. But its solution can not be promoted by depriving citizens of their constitutional rights.”

The rule was succinctly stated in *Re Opinion of the Justices supra*, as follows:

“The fact that a man is white, or black, or yellow, is not a just and constitutional ground for making certain conduct a crime in America, when it is considered permissible and innocent in a person of a different color.”

Executive Order No. 9066 and Public Act No. 503 are void.

From what has been said as to the unconstitutionality of the Public Proclamation No. 3, it necessarily shows that executive order No. 9066 and Public Act No. 503 are unconstitutional and void. Executive Order No. 9066 purports to authorize the proclamation and Public Law No. 503 to punish a violation of it. No executive order can authorize an unconstitutional order and no law can justify the punishment of a person for violating such an order.

This order grants to a military commander arbitrary authority over the actions of every person within the military areas to be defined. If the military proclamations were directed against the public generally, popular opinion would probably keep the unconstitutional fiats within some limits. When the power granted to the military, however, is construed to permit discrimination among citizens because of ancestry the usual results follow the grant of such arbitrary power. It is for this reason that we find thousands of innocent men, women and children today imprisoned

in stockades for no reason other than that they were unable to choose the ancestry of their parents.

CONCLUSION

The writers of this brief are not unaware of the fact that here and there among the thousands of American citizens of Japanese ancestry there may be found a few who might betray the land of their birth. Likewise, there are undoubtedly renegades among the German aliens and Italian aliens who are permitted to be at large by the same military authority which confines Japanese citizens and there no doubt are those who would betray this country who can trace their ancestry to four and five generations of American citizens.

The solution of such a problem as said in *Buchanan v. Morley*, *supra*, cannot be promoted by depriving citizens of their constitutional rights. The attack on Pearl Harbor was a great act of treachery which should be repaid in the American way and not by petty acts of injustices or by stripping American citizens of their most precious heritage. The appellant has asked for the opportunity to serve this country, the land of his birth and to die for it if necessary. He, and thousands like him, who have committed no offense indeed, who have intended none, should not be treated as criminals.

Respectfully submitted,

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No. 10317

In the United States Circuit Court of Appeals
for the Ninth Circuit

MINORU YASUI, APPELLANT,

v.

UNITED STATES, APPELLEE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10317

MINORU YASU, APPELLANT

v.

UNITED STATES, APPELLEE

GOVERNMENT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction, entered on November 18, 1942, in the United States District Court for the District of Oregon, upon an indictment charging appellant with having violated Section 97A of Title 18, U. S. C. (Public Law 503, 77th Congress, Chapter 191, approved March 21, 1942).¹

¹ *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.

The indictment charged that the appellant, Minoru Yasui, being within a properly designated military area, willfully remained away from his place of residence after the hour designated by the Commanding General of the area, thus knowingly acting contrary to and in violation of a regulation promulgated by the said Commanding General and applicable to defendant, a person of Japanese ancestry.

THE OPINION IN THE COURT BELOW

Upon trial, appellant did not dispute the facts charged in the indictment but raised the contention that he was a citizen of the United States and that as such the regulation of the Military Commander was unconstitutional as to him. At the conclusion of the trial the Court held that appellant had knowingly acted in violation of the regulation of the Military Commander, as charged, and further found that appellant had elected to accept Japanese citizenship, thus rejecting the American citizenship conferred upon him by birth in this country. Holding the regulation valid for such an alien, the Court found appellant guilty of the charge, a jury having been waived in writing.

In his opinion, however, the Court declared by way of dictum that in the absence of a declaration of martial law the court "must apply ordinary law and protect the rights of a citizen in a criminal case. If Congress attempted to classify citizens, based upon color or race and to apply criminal penalties for a violation of regulations, founded upon that distinction, the action is insofar void." (Tr. 45.)

By appropriate exceptions (Tr. 90) and assignments of error (Tr. 37) the appellant reserved exception to the judgment of guilty and the case thus comes to this Court upon appeal and was advanced on the calendar to be argued before the full Court *en banc* with the similar cases of *Korematsu v. United States* and *Hirabayashi v. United States*.

SCOPE OF GOVERNMENT BRIEF

This brief will be directed to the proposition that the Court should affirm the conviction of the appellant on the ground that the challenged regulation is constitutionally applicable not only to aliens but to citizens as well under the Federal war powers.

The only regulation actually involved in the instant case relates to a curfew for persons of Japanese ancestry. In the companion cases evacuation orders of the Commanding General of the Western Defense Command are also involved. Since the regulations in all three cases are interrelated as a part of a program to secure the defense of the nation, the validity of all regulations attacked in these cases will be considered herein.

STATEMENT

On December 8, 1941, Congress, in a joint resolution, declared a state of war to be existing between the Empire of Japan and the Government and people of the United States and authorized and directed the President,

* * * to employ the entire naval and military forces of the United States and the resources of the Government to carry on War against the Imperial Government of Japan;²

² 55 Stat. 795, 77th Cong., 2d Sess., c. 561.

Congress further declared that,

* * * to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.³

On December 11, 1941,⁴ the eight Western States and the Territory of Alaska were activated by the War Department as the Western Defense Command and designated as a "theater of operations" (Tr. 81). An area approximately 100 miles wide extending from the Canadian border along the Pacific Coast to the California-Mexican border was declared to be a "combat zone."⁵

Subsequently, February 19, 1942, the President issued Executive Order No. 9066⁶ in which the Secretary of War and Military Commanders designated by him were authorized and directed, whenever such action was necessary,

* * * to prescribe military areas in such places and of such extent as he or the appro-

³ Idem.

⁴ Field Order No. 1, December 14, 1941.

⁵ "The theater of war comprises those areas of land, sea, and air which are, or may become, directly involved in the conduct of the war.

"A theater of operations is an area of the theater of war necessary for military operation and the administration and supply incident to military operation. The War Department designates one or more theaters of operation.

"A combat zone comprises that part of a theater of operations required for the active operation of the combatant forces fighting." Field Regulations—Operations, War Department, May 22, 1941. Field Manual 100-5.

⁶ United States Code Cong. Service, No. 2 (1942) p. 157.

priate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion * * *.

Pursuant to the aforesaid Executive Order and the authority vested in him by the Secretary of War,⁷ Lieutenant General John L. DeWitt, on March 2, 1942,⁸ Commanding General of the Western Defense Command, declared the Pacific Coast of the United States (which area is included in the Western Defense Command) to be, because of its geographical location,

* * * particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations.

This proclamation designated certain areas within the Western Defense Command as "Military Areas" and "Military Zones" and declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, and further declared that with regard to other of said areas "certain persons or classes of persons" would be permitted to

⁷ Govt. Exhibit No. 3, Tr. 62.

⁸ Public Proclamation No. 1, Govt. Exhibit No. 4, Tr. 64.

enter or remain thereon under certain regulations and restrictions to be subsequently prescribed.⁹

Public Proclamation No. 2, dated March 16, 1942, designated further Military Areas and Military Zones, and contained a recital similar to the one in Public Proclamation No. 1 concerning the exclusion of persons, or classes of persons, from these areas, and regulations and restrictions applicable to persons remaining within them.

Congress enacted and on March 21, 1942, the President approved Public Act 503, the statute under which this prosecution was brought.¹⁰

Public Proclamation No. 3,¹¹ dated March 24, 1942, recited that the present situation within the previously described Military Areas and Zones required—

as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones * * *

and this Proclamation established the following regulations:

1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in

⁹ Idem.

¹⁰ See *infra* pp. 25–26.

¹¹ Govt. Exhibit No. 5, Tr. 68.

Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.¹²

It is the regulation contained in the above Proclamation which appellant was found to have violated by the Court below. The *Korematsu* and *Hirabayashi* appeals, argued with this case, also involve violation of the evacuation orders.

FACTS WARRANTING THE REGULATIONS HERE CHALLENGED

In the course of this brief it will be demonstrated that the regulation challenged in the instant case, as well as those challenged in the companion cases, are valid and constitutional as to citizens and aliens alike because they are reasonably related to the successful prosecution of the war. The question is whether the orders of the Commanding General of the Western Defense Command are so arbitrary and capricious that it can

¹² The Proclamation further declares that any person violating the established regulations will be subject to immediate exclusion from the Military Areas and Zones specified in Public Proclamation No. 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones."

be held by this Court that they have no relation to the war effort.¹³ An American citizen may not be evacuated from his home even in time of war, if that evacuation has no reasonable relation to the proper exercise of the war power or to some other power delegated to the Federal Government by the Constitution. The appellant must demonstrate that the evacuation was unreasonable.¹⁴

With the issues so drawn it would appear to be appropriate at this point to examine as briefly as possible the conditions which prevailed on the West Coast following the outbreak of the war and during the period in which the challenged regulations were in operation.

A. Military conditions on the west coast following the declaration of war

In February of 1942 the Japanese were at the crest of their military fortunes.¹⁵ They had succeeded in crippling the American Asiatic fleet at Pearl Harbor. They had swept the British, the Dutch, and the Americans from the Far East and from the Pacific Islands. The extent of the danger can be seen from the bold and confident attempt of the Japanese to take Midway Island in June of 1942. Had that attack

¹³ The extent to which the decisions of the military authorities are subject to review by the Courts is discussed hereinafter at page 48.

¹⁴ In the instant case, advanced for argument at the Government's request, the brief of appellant has not yet been received by the Government and we are thus unable to examine his position in this respect.

¹⁵ This being a matter of historical fact it may be judicially noticed. *Ono v. United States*, 267 Fed. 359 (C. C. A. 9th, 1920); see also *Treeson v. Imperial Irrigation District*, 59 F. (2d) 592 (C. C. A. 9th, 1932).

succeeded, Midway Island would have fallen, Hawaii would have been under the immediate threat of occupation, and the West Coast itself would have become vulnerable. At the time the regulations here challenged were promulgated, sound military strategy clearly indicated that our western seacoast was in imminent danger of attempted invasion by the armed forces of Japan.

Contributing to the threat of invasion was the apprehension of the use by the enemy of the so-called fifth column technique of warfare.¹⁶ The history of modern warfare prior to December 7, 1941, had amply demonstrated that one of the most effective weapons of an invader consists of sabotage and other forms of assistance afforded by sympathizers residing within the country under attack. Citizen and alien alike has been employed to carry on this type of warfare and the full extent of such assistance is, of course, not subject to determination until invasion has been successfully completed. Investigation by representatives of our Government proved that this type of warfare and the full extent of such assistance is, of Japanese armed forces in Hawaii, Malay, Burma, and New Guinea.¹⁷

¹⁶ The fact that the fifth column is employed as an instrument of modern warfare may be judicially noticed. *Ex Parte Liebmann* [1916], 1 K. B. 268, 274-5, 278.

¹⁷ Report of the Commission Appointed by the President of the United States to Investigate and Report the Facts Relating to the Attack Made by Japanese Armed Forces Upon Pearl Harbor in the Territory of Hawaii on December 7, 1941 (Justice Roberts' Report), pp. 12-13, Senate Document No. 159, 77th Congress, 2d Sess. The Court may take judicial notice of official Government reports. *Temple v. United States*, 248 U. S. 121 (1918).

It may be impossible to conduct any investigation which will adequately secure a guarantee against employment of the fifth column technique. To require evidence of that which, by definition, exists only by virtue of its ability to conceal all evidence of its existence would place upon the State an intolerable burden of proof at a time when it is struggling for survival against a dangerous and powerful enemy.

A matter warranting further apprehension was the fact that there are many vital defense installations within the area adjacent to the West Coast. The many ports on the Coast are vital embarkation points for men and materials. A large portion of the nation's war planes and one-fourth of its ships are being built in California alone. Troops and supplies and war materials are constantly being transported along railroads and highways within a few miles of the Coast. Throughout this section there are many Army camps and forts, training centers, arsenals and strategic naval defense bases. The continued operation of such projects is an important part of the war program and the presence of large numbers of Japanese in the area created grave danger of disturbance to the civil peace and order, as well as hazard to the safety of the Japanese themselves, with the consequent threat of interruption and delay in important war production.¹⁸ Further, the fact that so many of these defense in-

¹⁸ The Court may take judicial notice of economic and social conditions. *United States v. Hamburg-American Co.*, 239 U. S. 466; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292; *United States v. Wainer*, 49 F. (2d) 789 (DCWD, Pa.).

stallations were within the area subject to possible invasion aggravated the dangers to be expected from the use of the fifth column technique of warfare.

The continued residence of persons of Japanese ancestry within the military area reasonably was believed to be not only dangerous to the security of the country but, in addition, would have subjected the Japanese themselves to serious threat of harm. In the event of invasion such persons would have been indistinguishable in appearance from Japanese invaders disguised as loyal American citizens. Even in the absence of invasion it was apparent that persons of Japanese ancestry were constantly suspected of disloyal conduct and were thus subject to possible harm from our own citizenry, so conscious were our people of the tremendous extent and success of fifth column activities in the course of the European conflict.¹⁹ Incidents of violence against Japanese by Americans would have been seized upon by the enemy as propaganda fodder and as excuse for retaliatory measures against our own people who are so unfortunate as to be in the hands of the enemy.

B. The Japanese population within the Western Defense Command

At the outbreak of the war, approximately 130,000 persons of Japanese descent were residents of the three West Coast states. A considerable number of these resided in areas of great strategic importance,

¹⁹ Fourth Interim Report of Tolan Committee, p. 145 (H. R. 2124, 77th Cong., 2nd Sess.).

either along portions of the Coast likely to be selected for attack, or in proximity to factories engaged in production of war materials.

These persons of Japanese ancestry, citizens as well as aliens, have not readily assimilated with persons of other races living in our country.²⁰ There are many reasons for this. As a result many gifted young American citizens of Japanese ancestry may not have had a completely free field for the employment of their abilities. The Japanese are keenly aware of this and have been affected by it. Whether our conduct toward them in the past has been wise or not, the existence of this situation is a fact that must be considered by those responsible for the conduct of the war.

Some reasons for the fact that the Japanese have lived within themselves in our country lie in the fact that physical characteristics, institutions, customs, and traditions of these persons have imbued in them a strong sense of ancestral and race loyalty. In this connection the Empire of Japan has made every effort to retain the allegiance of the American Japanese, and through the doctrine of dual citizenship, Japan has claimed the loyalty even of those persons of Japanese descent born in the United States. Japanese laws and consular practice recognize and encourage the retention of Japanese citizenship by such persons and a considerable, but unknown, number of American citizens of Japanese descent have registered at

²⁰ The Court may take judicial notice of the fact "that the Japanese do not readily assimilate with other races, and especially with the white race." *Farrington v. Tokushige*, 11 F. 2d, 710 (C. C. A. 9th, 1926). See also *Chun Kock Quon v. Proctor*, 29 F. 2d 330 (C. C. A. 9th, 1937).

Japanese Consulates under these laws. Likewise, the practice of sending American children of Japanese descent to Japan, there to be indoctrinated with Japanese nationalism and imperialism, has contributed to the tendency of the Japanese to isolate themselves in separate communities. It has been the Japanese official policy to encourage the education of American-born Japanese children in Japan, and the practice has assumed considerable proportions.

An important factor which must be considered in evaluating the loyalty of persons of Japanese descent during time of war between our own country and Japan is the fact that a considerable number of American citizens of Japanese ancestry are devotees of the cult of Shinto. By this philosophy, the Emperor of Japan and his ancestors are worshiped as deities, thereby creating a conflict between religious loyalty to the Japanese Emperor and political loyalty to the United States. Furthermore, Japanese tradition attaches extraordinary importance to filial respect and closely relates such respect to patriotism. Thus the American-born Japanese must be influenced and to a greater or lesser extent dominated by the loyalties and philosophies of his parents who for the most part are Japanese aliens.

With this background it is to be expected that many Japanese in this country are susceptible to the propaganda of the Japanese Empire to the effect that the present war is one between races, in which brown and yellow men are seeking to overthrow the imperialistic domination of the white man; and it is readily apparent that by reason of the conflict of emo-

tions within the Japanese individual, resulting from the factors described above, the fact of citizenship alone, even when conferred by birth, might bear little relationship to the loyalty of the individual to our Government and institutions.

That persons of Japanese ancestry might be peaceful and law-abiding in the past is not the question. Rather, the question is whether or not the loyalty of such persons as a class may be relied upon in the event of an attempted invasion by the armed forces of Japan, particularly since it might appear that such an invasion would be construed as an indication that a Japanese victory was imminent.

In the light of such facts, it is submitted that it was a reasonable exercise of the war power to establish the regulations which are here challenged.

C. The evacuation program

The problem was met efficiently and humanely by Executive Orders 9066 and 9102, by the public proclamations of the military commander issued pursuant thereto, and by the manner in which the program was carried out. It was impossible to require a mass evacuation of persons without order and system and without assurance that they would be properly received in their new places of residence.²¹ A curfew was adopted,²²

²¹ The governors of every western state save one publicly announced that disorder would result from the unorganized transportation of Japanese to any section of their respective states. See Tolan Committee House Report No. 1911, March 19, 1942 (Preliminary Report and Recommendations on Problems of Evacuation of Citizens and Aliens from Military Areas).

²² Public Proclamation Number 3, Tr. 68.

pending plans for the organized evacuation of the Japanese to localities in which they would be properly received. Subsequently, the War Relocation Authority was established for the purpose of properly rehabilitating and relocating the evacuees in areas where they would be safe from any harm which might be caused by the prejudices arising from the fact of war. The evacuation itself was conducted systematically and efficiently. The evacuees were first moved to assembly centers, under management of civil authorities employed by the military authorities. Here they remained, attended by adequate medical personnel, pending the preparation of the more permanent relocation centers.

Thereupon, the evacuees were transported to the several relocation centers which had been prepared for their use. There the utmost possible liberty of action is accorded the evacuees. The internal management of the center is under the direction of the War Relocation Authority, a civilian agency. Within each center, there is a substantial degree of self-government. A local council, elected by the evacuee residents, promulgates ordinances having the force of law on practically every subject of police power and local concern relating to general welfare. These regulations are enforced by magistrates or commissions appointed from among the evacuees themselves. It is the policy in practice of the War Relocation Authority to accord the widest possible measure of democratic self-government.

All evacuees are given their subsistence and housing without charge. Employment is afforded within

the center to those who desire it, and a comprehensive program is under way to form cooperative organizations for the purpose of manufacturing articles useful to the war effort. In addition, an effort is being made by the War Relocation Authority to attract small private industries to locate adjacent to the centers, where the evacuees may be employed at prevailing wages. In the meantime, employment of evacuees outside the centers is being not only permitted but encouraged.

Elementary and high schools have been established in all centers, meeting state requirements for courses of study and providing curricula necessary for admission to colleges and universities. Evacuees who are qualified to attend colleges or universities are granted permission to leave the centers in order to pursue their education. Vocational training is offered within the centers themselves.

Each center is equipped with hospitals of the most modern type, as well as adequate medical and dental personnel.

Welfare services such as are approved in outside communities are furnished by the War Relocation Authority. Adequate recreational facilities are provided.

The citizen evacuee retains his legal domicile in the place of his former residence and exercises his civil rights, including the right to the ballot, precisely in the same manner as any other absentee citizen. Families in relocation centers are not separated. The Courts are open to the evacuee. In the management

and care of his property, he has the assistance of the appropriate Federal agency.

To facilitate group and individual employment outside relocation centers, to provide for attendance of the evacuees at educational institutions, and to allow the discharge of legal or other personal business, a system of leaves has been provided for by Regulations of the War Relocation Authority.²³ In addition to temporary or group work leave, an evacuee may apply for and receive an indefinite leave for no stated reason whatever except his desire to leave the relocation center. Persons granted indefinite leave may go to any part of the country and move from place to place provided they stay out of designated military areas. The policy of the War Relocation Authority is to encourage the application for and the issuance of indefinite leaves to the greatest possible extent consistent with job opportunities and with the prevailing attitudes and degree of receptivity of the communities in which the evacuees are to reside. The chief limitation in this regard is not one imposed by Government but by the opposition of some public opinion in this country to allowing the evacuees to work outside the relocation centers except under armed guard.²⁴ The evacuees are aware of these general attitudes and have been reluctant to leave the protection of temporary custody by the Government. If the fears both of the evacuees and the communities receiving them are dissipated, many more thousands of evacuees will apply for in-

²³ 7 Fed. Reg. 7656, Sept. 29, 1942.

²⁴ Fourth Interim Report of Tolan Committee, p. 32.

definite leave, thereby helping to relieve the serious labor shortage in this country.

Detention at the relocation center is not conceived as the necessarily ultimate objective of the program. Nor is it intended that the evacuees are to be kept at relocation centers until the end of the war. The relocation center is a staging point or depot for the care and protection of the evacuees during the inevitable period that must ensue in organizing and carrying out a systematic program for their resettlement. The objective of the program is the restoration of the Japanese to the normal life of the community in new places of residence, and it is hoped to carry this out for all those who wish to leave. For those who desire to remain, the relocation center will be a place of refuge from the unpredictable vicissitudes of war and public feeling. The restoration and reintegration of the detainees within the normal life of the rest of the community is the official policy of the Government and is being carried out in practice. This is the end phase of the program of resettlement and will be carried out by the device of the leave regulations promulgated by the Director of the War Relocation Authority. If this orderly program can be accomplished, it will not only solve the problem faced by mass evacuation in a humane manner worthy of a democracy, but it may lead to the permanent solution of the Japanese problem in the United States.

It is true that there are regulations imposed within the centers and that the evacuees are not permitted to leave the centers indiscriminately and completely at

will. However, any systematic program of resettling a large group of persons requires that they be kept temporarily in some place where they can live and be taken care of pending their orderly settlement in other communities. To maintain such places, rules have to be enforced on all residents, and the impatience to depart on the part of some must be restrained until proper conditions for their reception in their new places of permanent residence can be worked out. This would be true even if the resettlement program involved flood sufferers.

Given the decision to evacuate, temporary, precautionary detention was the only solution. It is argued by some, who admit the necessity for evacuation, that the Japanese should thereafter have been permitted to go freely into the interior communities. This indeed appears to be a superficially plausible solution, but it takes no account of political and social facts. What would have happened if 130,000 persons of Japanese descent had been shoved outside the borders of the coast States and told they were at liberty to go wherever they willed? They would have gone to communities where they were not wanted, and, without much regard for job opportunities or the housing situation. Large additional burdens would have been placed on the social service budgets of these communities. At the mere suggestion that the West Coast Japanese would be uprooted and dumped upon their States, the governors of every western State, with one exception, formally declared their opposition and warned against the consequences of such a move-

ment of population. Strong anti-Japanese sentiment began to form and threatened civil disorder. Demands arose from the press and from the other organs and representatives of public opinion that, since the problem had its origin in a Federal purpose, the responsibility for its orderly solution must be undertaken by the Federal Government instead of being unloaded on the States (H. R. 2124, *supra*, p. 145).

It is no answer to say that the reluctance of other communities to receive an influx of American citizens can be controlled and the prospect of violence can be met by sufficient police protection. The courts are under no obligation to ignore the facts that social struggle within the country when it is engaged in the greatest war of its history would be one of the most destructive forces against the success of our military effort.

The foregoing facts relating to conditions in the War Relocation Authority centers are not directly in issue here; but they are a part of a broad program of which the regulations which are challenged are but a part. The program as a whole must be considered in order to afford a clear exposition of the particular regulations. When an official sanction is assailed as a denial of due process, it is important not only to consider the terms in which the order for the action is formulated but also the manner in which the activity is carried out whether ruthlessly and arbitrarily or humanely and orderly. For this reason the foregoing material with respect to the evacuation program in its entirety has been included herein.

ARGUMENT

In the *Korematsu* and *Hirabayashi* cases the trial courts have held valid the application of the evacuation and curfew orders to American citizens of Japanese ancestry. The court below in the *Yasui* case, however, held that the curfew order was valid as to Japanese aliens and that the appellant, born in the United States, had elected to be a Japanese subject but that in the absence of a declaration of martial law Congress could not authorize the evacuation and curfew applicable to citizens on the basis of Japanese ancestry and could not make their acts criminal because they violated orders to be issued in the future by military commanders (Tr. 43-44).

The appellants' principal contention in the three cases appears to be that the particular exercise of the war power here attempted is invalid as applied to citizens because it involves a discrimination against a group based on race and therefore is prohibited by the due process clause of the Fifth Amendment to the Constitution.

The Government contends that the trial courts in the *Korematsu* and *Hirabayashi* cases correctly held that statutory provision making it a crime to violate the evacuation and curfew regulations applicable to all persons of Japanese ancestry was constitutionally applied in those cases. The court below held that the evacuation and curfew were valid only as to Japanese aliens. In view of the fact, however, that the other two appeals raise the question of the validity of the evacuation program as to citizens and in view of the

fact that the complete power over Japanese aliens given by other statutes and proclamations (Alien Enemy Act of 1798, 50 U. S. C. Sec. 21, Presidential Proclamation No. 2525 of December 7, 1941) indicates that it was not the intent that evacuation and curfew be separable and valid as to aliens alone, the Government does not here contend that the court below correctly held that the appellant elected to abandon his American citizenship and to become a Japanese subject. The correctness of the ground of the decision below is unnecessary to decide if the evacuation and curfew are determined to be valid.

I. THE EVACUATION AND CURFEW WERE AUTHORIZED BY EXECUTIVE ORDER 9066 AND BY ACTS OF CONGRESS

Appellants apparently have not contested the fact that the curfew and evacuation orders of General DeWitt, which they violated, were within the scope of the authority delegated by the President in Executive Order 9066, and by the Congress in Public Law 503, but instead appear to rest their case on the contention that the Executive Order, the statute and the action taken thereunder were unconstitutional. Nevertheless, for the sake of clarity, before proceeding to answer the appellants' constitutional arguments, we shall briefly recapitulate the legal history of the curfew and evacuation orders, for the purpose of demonstrating precisely that such orders were within the scope of the power delegated by the President and the Congress.

General DeWitt was designated on February 20, 1942, by the Secretary of War, as the military com-

mander authorized to carry out the duties imposed by Executive Order 9066 within the area encompassed in the Western Defense Command, which had been established on December 11, 1941, to embrace the Pacific Coast States (Public Proclamations No. 1 and 2). Acting under the provision of Executive Order 9066, empowering a military commander duly designated by the Secretary of War "to prescribe military areas in such place and of such extent as he * * * may determine," General DeWitt issued Public Proclamations No. 1 and 2, which establish as military areas the regions in which the appellants resided. The subsequent orders excluding persons of Japanese ancestry from these areas were unquestionably authorized by the provision that "any and all persons may be excluded" from the duly prescribed areas, as well as by the provision that in all such areas "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." It is equally clear that the curfew order with respect to the duty of specified classes of persons in the military area to remain within their homes during specified hours was within General DeWitt's power to impose restrictions on "right of any person to enter, remain in, or leave" the area and thus was in the discretionary power delegated by Executive Order 9066.

While the fact that General DeWitt's orders are within the scope of the terms of Executive Order 9066 is sufficient authorization, it may be noted also

that the Executive Order followed closely, both in time and content, the Congressional recommendations that military authority be used to effect the evacuation of persons of Japanese ancestry from the Pacific Coast States (see Report No. 1911, by the Select Committee Investigating National Defense Migration, 77th Cong., 2d Sess., pp. 3-5).

Congressional authority for the promulgation of the curfew and evacuation orders is derived from several sources. The express language of Public Law 503 (Appendix p. 93) clearly ratified and gave the force of legislation to Executive Order No. 9066 and confirmed the grant of authority to military commanders contained therein, since the military orders to which the statute attaches criminal sanctions are described as those issued under authority of the Executive Order.

Furthermore, the legislative history of this statute shows that the congressional intent contemplated evacuation and curfew. The bill which became Public 503, was introduced in the Senate on March 9, 1942, and in the House on March 10, 1942, at the request of the War Department and was enacted for the express purpose of providing a means of enforcement of orders issued under Executive Order No. 9066.²⁵ Rep-

²⁵ Identical letters from the Secretary of War to the Speaker of the House and to the Chairman of the Senate Committee on Military Affairs stated (Cong. Rec. for March 19, 1942, p. 2804 (unbound edition, temporary pagination changed in bound volume); House Report No. 1906, 77th Cong., 2d Sess., p. 2):

"The purpose of the proposed legislation is to provide for enforcement in the Federal criminal courts of orders issued under the authority of the Executive Order of the President, No. 9066,

representative Costello for the House Military Affairs Committee stated the legislative understanding that curfew restrictions and the removal of persons, citizens as well as aliens, from military areas was contemplated.²⁶ When the bill was discussed in the Senate, Senator Reynolds, Chairman of the Senate Military Affairs Committee, read a newspaper item stating that "evacuation of the first Japanese aliens and American-born Japanese from military area No. 1" was about to commence; described the proposed evacuation; read to the Senate the Report of the Committee on Military Affairs, which included the above-quoted letters; read General DeWitt's Public Proclamation

dated February 19, 1942. This Executive Order authorized the Secretary of War to prescribe military areas from which any and all persons may be excluded for purposes of national defense."

The Secretary of War wrote to the Chairmen of the Senate and House Committees on Military Affairs in identical letters dated March 13 and 14, 1942, respectively, as follows (Cong. Rec. for March 19, 1942, p. 2807; House Report No. 1906, p. 3), that "the bill, when enacted, should be broad enough to enable the Secretary of War, or the appropriate military commander to enforce curfews and other restrictions within military areas and zones."

²⁶ The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities. In order to provide such protection it has been deemed advisable to remove certain aliens as well as citizens from areas in which war production is located and where military activities are being conducted. To make such removal effective, it is necessary to provide for penalties in the event of any violation of the orders or restrictions which may be established, as well as to enforce curfews, where they may be required (House Report No. 1906, p. 2).

No. 1; and stated the common understanding of the bill.²⁷

On the House Floor when the bill was being considered for enactment, its immediate passage was urged on the basis that "evacuation is taking place now" (Cong. Rec., March 19, 1942, p. 2812).

In addition to the Congressional authorization of the evacuation and curfew orders demonstrated by the language and the legislative history of the criminal statute, Congress further showed its approval of the program when subsequent to the issuance of the major part of General DeWitt's evacuation orders the Act of Congress of July 25, 1942, appropriated the sum of \$70,000,000 for the War Relocation Authority, including in the authorized expenditures, "expense incident to the extension of the program provided for in the Executive Order of March 18, 1942 (Executive Order No. 9102 establishing the War Relocation Authority) to persons of Japanese ancestry not evacuated from military areas," as well as expenditures incurred in the maintenance of War Relocation Authority projects (P. L. 678, Laws of 77th Cong., 2d Sess., c. 524, 56 Stat. 704).

At the time the bill was approved by the President and became law on March 21, 1942, Lt. Gen. DeWitt

²⁷ It is my understanding that in order to carry out the objectives of the Proclamation, and thus keep clear the military areas which have been defined by General DeWitt, the commander of the western area, we are asked to provide the department with authority to keep certain individuals from entering or leaving military zones, or not complying with any of the curfew laws, or any regulations which might be established within those zones (Cong. Rec. for March 19, 1942, pp. 2804-2807).

had already issued Proclamation No. 1 of March 2, 1942, designating certain military areas and military zones and providing that such classes of persons as the situation may require would by subsequent proclamation be excluded from the areas and zones. Proclamation No. 2 of March 16, 1942, designating additional military areas and zones, repeated the provision that classes of persons as the situation might require would by subsequent proclamation be excluded from zones within the military areas and provided that German and Italian aliens and persons of Japanese ancestry residing in the Western Defense Command who changed their places of habitual residence were required to obtain and execute change-of-residence notices.

Immediately subsequent to March 21, 1942, Proclamation No. 3 of March 24, 1942, provided the curfew for German and Italian aliens and all persons of Japanese ancestry and provided that exclusion orders would thereafter be issued. Proclamation No. 4 of March 27, 1942, prohibited further voluntary evacuation of Japanese persons from Military Area No. 1. On May 3, 1942, Civil Evacuation Order No. 34, involved in the *Korematsu* appeal, and on May 10 Civil Evacuation Order No. 57, involved in the *Hirabayashi* appeal, were issued.

It is submitted that Public 503 constituted not only clear authorization of the action taken after March 21, 1942, but also a plain legislative ratification of Executive Order 9066 and of the evacuation and curfew pursuant thereto under settled doctrine that such

ratification is the legal equivalent of prior direction by Congress. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 300-303; *Isbrandtsen Moller Co. v. United States*, 300 U. S. 139, 146-148; *Tiaco v. Forbes*, 228 U. S. 549, 556; *United States v. Heinszen & Co.*, 206 U. S. 370, 382, 384; *Prize Cases*, 2 Black, 635, 671. The statutory ratification and authorization of the evacuation and curfew orders constituted them an exercise of authority granted by Congress to the President. In addition to Public 503 the Appropriation Act of July 25, 1942 constituted a Congressional ratification of the evacuation. Such appropriation acts are a common form of Congressional ratification. *Isbrandtsen Moller Co. v. United States*, *supra*, at page 147.

It is clear, therefore, that the evacuation was authorized by the President and the Congress and the only question is the constitutionality of the action taken under such executive and statutory authority.

II. THE EVACUATION AND CURFEW WERE A VALID EXERCISE OF THE WAR POWERS OF THE CONGRESS AND OF THE PRESIDENT AND A VALID EXERCISE OF THE PRESIDENT'S POWER TO EXECUTE THE LAWS

There can be no doubt that the evacuation and curfew were undertaken in connection with the war effort and as an attempted exercise of the war powers of this nation which are lodged completely in the federal government. The Government contends that the action taken was a valid exercise of the following grants of constitutional powers, among others:

ARTICLE I

SECTION 8. The Congress shall have Power
 (1) To lay and collect Taxes, Duties, Imposts
 and Excises, to pay the Debts and provide for
 the common Defense and general Welfare of
 the United States; * * *.

* * * * *

(11) To declare War, grant Letters of
 Marque and Reprisal, and make Rules concern-
 ing Captures on Land and Water;

(12) To raise and support Armies, but no
 Appropriation of Money to that Use shall be
 for a longer Term than Two Years;

(13) To provide and maintain a Navy;

(14) To make Rules for the Government and
 Regulation of the land and naval Forces;

(15) To provide for calling forth the Militia
 to execute the Laws of the Union, suppress In-
 surrections and repel Invasions;

(16) To provide for organizing, arming, and
 disciplining, the Militia, and for governing such
 Part of them as may be employed in the Serv-
 ice of the United States, reserving to the States
 respectively, the Appointment of the Officers,
 and the Authority of training the Militia
 according to the discipline prescribed by Con-
 gress;

* * * * *

(18) To make all Laws which shall be neces-
 sary and proper for carrying into Execution
 the foregoing Powers, and all other Powers
 vested by this Constitution in the Government
 of the United States, or in any Department or
 Officer thereof.

ARTICLE II

SECTION 1. (a) The executive Power shall be vested in a President of the United States of America. * * *

* * * *

SECTION 2. (1) The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States; * * *

SECTION 3. * * * he shall take Care that the Laws be faithfully executed, * * *.

Pursuant to their constitutional powers the Congress adopted and on December 8, 1941, the President approved Joint Resolution 116 (Public Law 328, Chap. 561, 77th Cong., 2nd Sess., 55 Stat. 795) which provides as follows:

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are

hereby pledged by the Congress of the United States.

On February 19, 1942, pursuant to his constitutional power and the authorization and direction of Congress to employ the entire naval and military forces and the resources of the Government to carry on the war, the President issued Executive Order No. 9066 which provides that whereas the successful prosecution of the war requires every possible protection against espionage and sabotage to national defense materials, premises, and utilities as defined in the Act of April 20, 1918, as amended (50 U. S. C. Sec. 104), the Secretary of War and the military commanders designated by him are authorized and directed to prescribe military areas in such places and to such extent as they may determine from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War, or the appropriate military commander, may impose in his discretion. The Executive Order authorizes the use of federal troops to enforce compliance with restrictions applicable to each military area and authorizes and directs other agencies to assist in carrying out the Executive Order.

The events of the war which had occurred between the attack on Pearl Harbor and the issuance of this order, stated elsewhere in this brief and well known to the court, amply warranted the President's action. The extent of the disaster at Pearl Harbor, only recently disclosed to the public, was all too well known

to the Commander in Chief and the military authorities and left the military and naval installations, airplane, shipyard, and other war manufacturing plants located on the West Coast more subject to destructive attack by the enemy. It was learned that Japanese espionage had supplied the Japanese forces with precise information as to the disposition of the vessels of the fleet in Pearl Harbor, the nature and location of anti-aircraft defenses and the time and course of flight of air patrols.²⁸ On December 11, 1941, the Western Defense Command had been established and designated a theatre of operation (R. 146-147). Substantially all of the population of Japanese ancestry in the United States resided in the West Coast area. Great public apprehension was expressed, including expressions by members of Congress from the West Coast states and local officials, that even if the great majority of persons of Japanese ancestry were loyal to the United States, a number of them, citizens and aliens alike, might be disposed to assist the enemy, particularly in case of an attack. There was also great apprehension expressed that in the event of attack the Japanese population might be subjected to violence on a mass scale before the governmental authorities could prevent it. The federal civilian authority to control Japanese aliens which was lodged in the Department

²⁸ Report of the Commission Appointed by The President Of The United States To Investigate And Report The Facts Relating To The Attack Made By Japanese Armed Forces Upon Pearl Harbor In The Territory Of Hawaii On December 7, 1941 (Justice Roberts' Report), pp. 12-13, Senate Document No. 159, 77th Congress, 2nd Sess.

of Justice did not extend to American citizens of Japanese ancestry. It was in these circumstances that the military authorities requested and the President determined to issue Executive Order No. 9066.

Executive Order No. 9066 and the curfew and evacuation regulations issued pursuant to it and followed by Public 503 constituted not only an exercise of the constitutional war powers of the President, as Commander in Chief, and of Congress but also an exercise of the President's constitutional executive power to take care that the laws be faithfully executed. It is, therefore, not necessary to maintain that evacuation and curfew is an exercise of either the executive or legislative war power exclusively or to explore the precise constitutional limits of these powers separately or to review the much discussed general question of the field which either of these powers may occupy to the exclusion of the other. *Hamilton v. Dillin*, 21 Wall. 73, 87-88; Corwin, *The President, Office and Powers* (1940); Charles Warren, *Presidential Declarations of Independence*, 10 Boston University Law Review 1; Randall, *Constitutional Problems Under Lincoln* (1926); Berdahl, *War Powers of the Executive in the United States* (1921); Taft, *The Presidency* (1916).

A. An exercise of the Executive war powers is involved

Article I grants the legislative war power in express and specific language, but Article II grants the whole executive power to the President, including the executive war power, in general language. There is no specific limitation in the language of the Constitution granting the power, and in view of the nature of the

executive war power and the circumstances of national peril which call for its exercise, often before the legislative war power can be exercised, the courts have emphasized its broad and untrammelled scope when it is used to meet the wholly unprecedented emergency which every war brings to a democratic nation. The war power of the Commander in Chief is not limited to directing maneuvers of troops against the enemy but pervades the entire field of military activity. It involves the duty of taking whatever action is necessary to secure the military protection of the country and to wage the war successfully. *United States v. Sweeny*, 157 U. S. 281, 284; *Stewart v. Kahn*, 11 Wall. 493, 506; *Prize Cases*, 2 Black. 635, 670; *Hamilton v. Dillin*, 88 U. S. 73, 87-88; *Respublica v. Sparhawk*, 1 Dall. 357; *Commercial Cable Co. v. Burleson*, 255 Fed. 99 (SDNY); Story, *Commentaries on the Constitution*, Vol. 2, p. 314 (4th Ed. 1873).

In *Stewart v. Kahn*, *supra*, the Court, upholding the constitutionality of the Act of Congress of June 11, 1864, tolling state statutes of limitations, stated (p. 506-7):

The President is the commander in chief of the army and navy, and of the militia of the several States, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such ques-

tions rests wholly in the discretion of those to whom the substantial powers involved are confined by the Constitution.

In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority.

The first World War did not involve the risk of an enemy invasion which prompted the action taken in this case. The Civil War presents the only comparable situation calling for the prompt and vigorous exercise of the executive war power. President Lincoln, in the absence of Congressional action, dealt with an unprecedented national emergency by his Proclamations of April 15, 1861 (12 Stat. 1258), announcing the rebellion and calling for volunteers, and of April 19, 1861 (12 Stat. 1258), announcing the blockade of the ports of the southern States by the naval forces and providing that vessels running the blockade might be condemned as prize. In the *Prize Cases*, *supra*, the Supreme Court sustained the legality of the exercise of the executive war power to provide a blockade and stated (p. 670):

Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an in-

surrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. [Italics by the Court.]

It is submitted that if, as in the *Prize Cases*, prior to a declaration of war the executive war power could be constitutionally exercised against loyal citizens solely on the basis of their residence in the states where the rebellion was active, but in which they had no part, and could designate them as enemies and subject their property to forfeiture as prize, *a fortiori* after the declaration of war of December 8, 1941, directing him to use all resources of the government (55 Stat. 795, 77th Cong. 1st Sess. c. 561), the unprecedented emergency which faced the Chief Executive in this case could be dealt with constitutionally by the exercise of the executive war power to evacuate all persons of Japanese ancestry from the most crucial area in the country and to place them under a curfew as a restriction supplemental to the evacuation.

B. Exercise of the war power of Congress is involved

Evacuation and curfew were based not only on an exercise of the executive war power in Executive Order 9066, supported by the prior exercise of the legislative war power in the Joint Resolution declaring war and in the criminal statute making it a felony to damage national defense materials (50 U. S. C. 104), but also were based, as has been shown (Point I) on specific exercises of the legislative war power found in the Act of March 21, 1942, Public 503 of the last Congress (18 U. S. C. Sec. 97A), making it a misdemeanor to violate the military regulations and found in the appropriation acts of Congress appropriating funds to carry out the evacuation and relocation program.

The plenary character of the power of Congress to wage successful war, thus exercised in this case, and its extension to every matter relating to the carrying on of war has been repeatedly emphasized. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326; *United States v. Macintosh*, 283 U. S. 605, 622; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161; *McKinley v. United States*, 249 U. S. 397; *Schenk v. United States*, 249 U. S. 47; *Selective Draft Law Cases*, 245 U. S. 366; *Raymond v. Thomas*, 91 U. S. 712, 714-715; *Stewart v. Kahn*, 78 U. S. 493, 507; *Miller v. United States*, 11 Wall. 268. From the very numerous decisions of the Supreme Court upholding all types of exercise of the Congressional war power these cases are chosen to illustrate the unlimited range of subject matter which Congress

may constitutionally regulate under the war power. It is not believed that a case can be cited in which the Supreme Court has ever held that any act of Congress under the war power exceeds the constitutional limits of that power.²⁹ On the contrary, all the cases decided both in war and peace make it abundantly clear that the war powers of Congress are substantially unlimited. In *United States v. Macintosh*, *supra*, the Court reviewed the scope of the Congressional war power in the following words (p. 622-623):

From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams—"This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and life." To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial

²⁹ *United States v. Cohen Grocery Co.*, 255 U. S. 281, cited by appellants, did not hold that Congress could not constitutionally achieve the legislative objective of the Lever Act but merely held that in exercising the war power to achieve that objective the Fifth Amendment prohibited the attempted creation of a crime so vaguely and indefinitely defined that a prospective defendant could not tell in advance whether his act would be criminal.

by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war. These are but illustrations of the breadth of the power * * *.

In *Miller v. United States, supra*, holding valid the confiscation of property of persons aiding the enemy, the court said (p. 305):

Of course, the power to declare war involved the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.

In *Stewart v. Kahn, supra*, upholding the power of Congress to toll state statutes of limitations during and after the Civil War, the court stated (p. 507):

* * * the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.

During the earlier wars in this nation's history, fought on a simple basis, it was not necessary in the prosecution of the war for the Government to take over the direction of the entire economic life of the nation. In the first World War, however, where this

was necessary to a degree, the Supreme Court unfailingly held that Congress had the power to control matters which Congress believed would assist in the prosecution of the war including, for example, operation of the railroads (*Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135); operation of systems of communications (*Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163); prohibition of the sale of liquor (*Hamilton v. Kentucky Distilleries Co.*, *supra*); seizure of property of a wide class of persons defined as enemies (*Central Trust Co. v. Garvan*, 254 U. S. 554); regulation of speech to a degree not permissible in times of peace (*Schenk v. United States*, *supra*); suppression of prostitution in military areas (*McKinley v. United States*, *supra*); and compulsory draft of persons to serve in the armed forces (*Selective Draft Law Cases*, *supra*).

Following the last war and up to the present the courts have continued to recognize the necessity for giving the broadest scope to the war power. *Ashwander v. Tennessee Valley Authority*, *supra*; *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 426, 447-448. Already in the present war the courts have approved hitherto unprecedented exercises of the war power, such as the draft before entry into the war. *Local Board No. 1 v. Connors*, 124 F. (2d) 388 (C. C. A. 9). The exercise of the war power of Congress to deal with matters not immediately affecting the conduct of the war have been upheld. *Hamilton v. Kentucky Distilleries Co.*, *supra*; *Raymond v. Thomas*, *supra*; *Stewart v. Kahn*, *supra*. *A fortiori*, the exercise of the war power

here involved, which was directly connected with the military situation, was clearly an exercise of the war powers of the national government.

Indeed, even if evacuation were a new type of exercise of the war power, these decisions cited clearly teach that Congress may extend the exercise of the war power to new subjects whenever in its judgment that course is necessary. In fact, however, evacuation and the analogous removal of goods which might fall into the hands of the enemy, is a customary exercise of war power and is recognized military strategy both in the present and in former wars and both here and abroad. *Lockington's Case*, Brightly N. P. (Pa.) 269; *Lockington v. Smith*, 1 Pet. C. C. 466, Fed. Cas. No. 8448 (requiring alien enemies to evacuate to 40 miles beyond tidewater); *Ronnfeldt-Phillips*, (K. B. 1918) 35 T. L. R. 46 (evacuation of an individual from a military area); *Emergency Powers (Defense) Act*, 1939 (2 & 3 George VI., c. 62); *War Measures Act* (c. 206, Rev. Stat. Canada 1927); ³⁰ *Respublica v. Sparhawk*, 1 Dallas 357 (removal

³⁰ Under the English Act which authorizes regulations necessary for securing the public safety and the efficient prosecution of the war, the British Government provided by the Defense (General) Regulations, 1939, Part 2, Section 21 (S. R. & O., 1939, No. 927, as amended, 32 Halsbury's Statutes of England, p. 1237) :

(1) A Secretary of State or the Admiralty * * * may, if it appears to him or them to be necessary or expedient so to do for the purpose of meeting any actual or apprehended attack by an enemy or of protecting persons and property from the dangers involved in any such attack, make, as respects any area in the United Kingdom. * * *

(a) an order directing that after such time as may be specified in the order, no person other than a person of such a class as may

The character of civilian evacuation as a military measure is also indicated by the German created evacuated areas along the Dutch and French coasts as a military protection against invasion. It is submitted that in this respect the United States cannot be held to have less power than its allies or its enemies to protect itself against invasion unless a specific prohibition against such an obvious exercise of the war power can be found in the Constitution, a question examined in Point III below.

be so specified shall be in that area without the permission of such authority or person as may be so specified; * * *

(2) An order made under paragraph (1) of this Regulation for the removal of persons or property from any area—

(a) may prescribe the routes by which persons or property, or any particular classes of persons or property, are to leave or be removed from the area;

(b) may prescribe different times as the times by or at which different classes of persons or property in the area are to leave or be removed therefrom;

(c) may prescribe the places to which persons are to proceed on leaving that area in compliance with the order;

(d) may make different provision in relation to different parts of the area; and may contain such other incidental and supplementary provisions as appear to the authority or person making the order to be necessary or expedient for the purposes of the order.

The defense of Canada Regulations are similar to the quoted English regulations and the Order of the Minister of Justice of August 18, 1942, under the Regulations (Canada Gazette, Extra No. 96, August 31, 1942) provided for a specific protected area in the Province of British Columbia along the Pacific Coast similar to our military areas, the following provisions in part:

"9. Every person of the Japanese race shall leave the protected area aforesaid forthwith.

"10. No person of Japanese race shall enter such protected area except under permit issued by the Royal Canadian Mounted Police."

C. Executive power to execute the laws is involved

Article II, Section 3 of the Constitution provides that the President "shall take care that the laws shall be faithfully executed * * *." It has been repeatedly recognized that it is the duty of the President, and that it is within his executive power, to take care that the laws be faithfully executed and that the sovereignty of the United States be maintained, not only in war (*Stewart v. Kahn, supra*, p. 506; *Prize Cases, supra*, p. 668), but also in peace. *In re Debs*, 158 U. S. 564; *In re Neagle*, 135 U. S. 1; *United States v. San Jacinto Co.*, 125 U. S. 273; *Wells v. Nickles*, 104 U. S. 444; Corwin, *The President, Office and Powers*, pp. 126-136. The Government contends that this power to execute the laws constitutes, if it were necessary in the absence of reliance on the war power, a separate constitutional basis for Executive Order 9066. In the *Neagle* case, *supra*, affirming an order granting a writ of habeas corpus releasing Justice Field's marshal from the custody of the California authorities by whom he was held on a murder charge for killing an individual who attempted to attack the Justice, the court upheld the exercise of the federal executive power to prevent interference with the exercise of its sovereignty through the federal judiciary and stated (pp. 63-64, 67):

If we turn to the Executive Department of the government, we find a very different condition of affairs (from that in the legislative department. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed,"

and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms* or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? * * *

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death * * *.

It is submitted that if a United States Marshal in the exercise of the federal executive power may kill a man in the course of protecting a federal judge, *a fortiori* the commanding general of the Western Defense Command may be designated to exercise the power of the chief executive to evacuate a group of civilians to protect the public safety of the entire country and the preservation of the sovereignty of the United States.

In the *Debs* case, *supra*, upholding an injunction, obtained by the Government in the absence of specific legislation, to protect the passage of mails and to keep open the railroad channels of interstate commerce, the court quoted from *Ex Parte Siebold*, 100 U. S. 371 (p. 395):

We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

Moreover, in the instant case an Executive order was preceded not only by the Joint Resolution declaring war on the Empire of Japan, authorizing and directing the President to employ the resources of the Government to carry on the war, but there was also the specific statute of Congress enacted in exercise of the war power (50 U. S. C. 104) making it a felony to commit sabotage or any injury to national defense ma-

terials. The Executive order of the President specifically recites as one reason for its issuance that the successful prosecution of the war requires every possible protection against espionage and sabotage to such materials. It is submitted that the Executive order and the evacuation and curfew undertaken thereunder was a proper exercise of power and the duty of the President to take care that the laws be faithfully executed.

It is submitted that the evacuation and curfew clearly were exercises of the war powers of Congress and the President and also exercises of the President's power to execute the laws and that the applications of curfew and evacuation in these cases were constitutional unless the appellants can show that these applications in their cases were so capricious that they were denied due process of law, the remaining major question now to be considered.

III. EVACUATION AND CURFEW DO NOT DENY THE APPELLANTS DUE PROCESS OF LAW

The appellants contend that the evacuation and curfew were unreasonable and deprived them of liberty without due process of law in violation of the Fifth Amendment of the Constitution. In addition to this general contention the appellants make the specific contentions (*Korematsu*, p. 62, 95; *Hirabayashi*, p. 13) that they were denied due process of law because the evacuation and curfew involved an arbitrary discrimination based on their race.

The Government contends (A) that it cannot be said that the evacuation program was not reasonably related to national defense; (B) that because evacuation

and curfew were reasonable exercises of the federal war powers they did not deprive the appellants of due process of law, and (C) that the application of evacuation and curfew to all persons of Japanese ancestry was a reasonable classification.

A. This court cannot find that the evacuation program was not reasonably related to the defense and reasonably necessary to the accomplishment of that purpose

In limine, it must be stressed that the test of reasonable military necessity which is to be applied to the exercise of the war power in this case is not whether this Court now will deem that the measures which have been taken were or are not now necessary, or even whether this Court would have acted as the military commander did at the time when he acted, but is solely whether the action taken was, in the honest judgment of the military commander, reasonably related to or reasonably necessary to the achievement of a military end. Any other test would be useless. Obviously the Court cannot judge the military necessity of action taken in February 1942, only two months after Pearl Harbor, in the light of the military situation as of February 1943. Similarly, the Court cannot judge the military situation by considering whether its members would have reached the same conclusion as the military commanders in fact did. They can only consider whether the military commander's judgment was honestly and reasonably exercised. In order for the Court, therefore, to find that the evacuation program was not a proper military measure, the Court would have to say that

a reasonable military commander could not honestly have believed that the evacuation of the Japanese was necessary. This the Court cannot do.

The military commander was responsible for repelling a possible Japanese invasion which, if successful, would have destroyed our nation. Faced with a responsibility of that sort, the obligation was to examine the cold facts that over 100,000 Japanese were grouped along the seacoast; our Pacific Fleet had been rendered all but powerless for the time being; there was grave danger that the Japanese would attempt to land an army on our coast. Taking all proper military precautions it was not unreasonable to believe that this group of a hundred thousand people might contain a large and formidable number who would assist the Japanese if they undertook to land, either by acts of espionage or sabotage or by more direct cooperation. The fact that the great majority of the people were loyal to the United States and would not assist an invasion is irrelevant since the cooperation of even a few hundreds or thousands strategically placed in the event of a surprise invasion attempt might make the difference between initial victory and defeat.

Appellants in their various briefs seek to avoid these real possibilities by urging that other less drastic modes of dealing with the military problem might have been adopted. Although it is legally sufficient to point out (*infra*, p. 69) that the choice of methods with which to deal with a military problem is peculiarly one for the military commander and constitutes a field

which is peculiarly ill-suited for judicial determination, it may also be said that neither of the alternatives proposed by appellants was in fact available.

Appellants assert that individual administrative hearings might have been given each Japanese for the purpose of determining whether his loyalty was such that he could safely be exempted from evacuation. In the first place, no hearing could be of any value without investigation, and any one investigation requires the expenditure of much of the time of a trained investigator. In addition, the hearing itself requires extensive time. Even assuming that investigations could be made and hearings conducted on the basis of family groups, it still would have been necessary to conduct thousands upon thousands of investigations and to hold thousands upon thousands of hearings. Meanwhile, the peril of a Japanese attack would by no means be abating. Granting, for the moment, that in a year or two years hearings would have been given to each Japanese, a hearing program obviously would not have answered the military problem. What General DeWitt needed was a method of removing the possible five or ten thousand persons who might assist in a Japanese invasion attack before the attack struck, and not a program for sifting out such persons within a period of one, two, or more years.³¹

The second answer to appellant's argument about hearings is that, even if there had been time to have

³¹ Based on investigations by the Federal Bureau of Investigation over a course of years, about 10,000 hearings have been granted to alien enemies throughout the United States since December 7, 1941.

hearings, there is no reason to suppose that such hearings would be of sufficient practical value. As has already been said, the Japanese, with exceptions, constituted an ethnic and cultural minority which was little assimilated within the general population. The religion, the mores, and even the language of this minority was alien to the general population of the Pacific Coast. Under these circumstances, hearings to determine what particular Japanese would do in the event that the Japanese army and navy succeeded in putting a landing party ashore on our Pacific beaches would have been little more than a farce. We here concede that the vast majority of the Japanese population is thrifty, industrious, and law-abiding. We also concede that the majority is loyal to the United States. In every hearing evidence of thrift, industry, devotion to family and of the absence of a criminal record would have been introduced, and then the Hearing Board, on the basis of this evidence, would have been asked to look deep into the mind of a particular Japanese and tell whether it was his belief that loyalty to the Emperor and to Japan would require him to assist a Japanese invading army.

Appellants' second alternative proposal is that the Federal Bureau of Investigation and possibly other investigative agencies should have investigated the Japanese on the West Coast and have taken in custody those appearing to be disloyal.³² Here the answer is three-fold. In the first place, although alien Japanese

³² Hirabayashi Reply Brief, p. 4; Korematsu Closing Brief, p. 14.

individually conceived to be dangerous to the safety of the country have been apprehended and interned pursuant to Section 21, Title 50, U. S. Code, there is no statute whatever authorizing the internment of potentially dangerous United States citizens, and thus appellants' suggestion is without any legal basis. In the second place, even if there had been a legal basis, it is clear that the investigation of 100,000 cases would have taken several years, and there was no assurance that the enemy would wait until the investigation had been completed. In the third place, as has been said before of hearings, the question of what a Japanese would do in the event of an invasion is not one which is susceptible of investigation. Granted the high qualities of the Federal Bureau of Investigation and that it is able to investigate and determine matters of fact, it has never asserted that it can exercise powers of clairvoyance. Appellants cannot suggest any method by which the use of detective work would determine the question of whether a man's worship of Emperor Hirohito would lead him to take up arms if he had a chance or of determining out of a group of 100,000 persons of Japanese ancestry which ones of them in fact continued secretly to worship Hirohito and continued ready to die for his military glory.

Thus, for a variety of reasons the alternative proposals suggested by appellants are without value. Since no serious argument has been made or can be made which will persuade this Court that the Pacific Coast was not in danger of attack and that there was not a real and present danger that a significant number of the Japanese residing along the coast might

assist the Japanese army and navy if such an attack were made, and since there was no method of meeting this danger other than the evacuation of the entire group, it is clear that the evacuation program was dictated by military exigency. This Court, therefore, cannot find that the program was not an exercise of honest military judgment and that it was not reasonably related to the military problem, and that it was not reasonably necessary to military success. Thus, since the limits to the exercise of the war power by the federal Government are that the exercise be not forbidden by a specific provision of the Constitution, and that it be, in the honest judgment of the military commander, reasonable and related to the military end sought, and reasonably necessary to the achievement of that end, it follows that the Government's affirmative case has now been completely established and that appellants must fail unless they can demonstrate to the Court that a specific provision of the Constitution forbids the particular exercise of the war power.

**B. Because the evacuation and curfew were not manifestly unreasonable
due process of law was not denied**

It is settled law that the exercise of the governmental power delegated to the federal government by the Constitution is not prohibited by the Fifth Amendment to that Constitution unless the action taken can be shown to be wholly unreasonable, arbitrary, and capricious. In the cases establishing the extent of the war power recourse to the due process clause on the ground that the exercise of power is a mere pretext or unreason-

able has uniformly and repeatedly failed.³³ *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146; *Highland v. Russell Car Co.*, 279 U. S. 253; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288; *Selective Draft Law Cases*, 245 U. S. 366, 378.

Even where a deprivation or restriction of personal liberty is not by the exercise of such a paramount exclusive federal power as the war power but involves an exercise of the police powers of the state and the application of the due process clause of the Fourteenth Amendment, the courts hold that the due process clause only prevents an oppressive and arbitrary interference with personal liberty. *Cantwell v. Connecticut*, 310 U. S. 296; *Minnesota v. Probate Court*, 309 U. S. 270; *Compagnie Generale Francaise de Navigation a Vapeur v. Board of Health*, 186 U. S. 380. Even in respect of so important a personal right as that of expressing religious belief, the due process clause does not import that Government may not, under any circumstances, deprive an individual of this liberty, but only that the "power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom" of the in-

³³ In *United States v. Cohen Grocery Co.*, 255 U. S. 81, relied on by appellants, the court merely held that the words used to define an offense under the Lever Act were too vague and indefinite to apprise a person of the conduct constituting a crime and that therefore a conviction would deny him due process of law, but did not hold that food regulation under the Lever Act was an unreasonable exercise of the war power. In the present cases there is no room for a contention that the offenses were not wholly specific and definite, namely, failure to obey the explicit curfew and evacuation orders.

dividual. *Cantwell v. Connecticut, supra*, at p. 304.

Possibly the most lucid expression of this doctrine is to be found in *Jacobson v. Massachusetts*, 197 U. S. 11, in which the Court held, in substance, that if it reasonably appeared that the health of the public generally required it, an individual could be compelled to submit to an actual physical cutting of his person in the form of vaccination. At pp. 26-30 the Court stated:

* * * The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members * * *.

Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others * * *.

Upon the principle of self-defense of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members * * * in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer v. Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the con-

stituted authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger.

There is, in fact, little doubt that an individual may even be confined, in the absence of any accusation of crime, if the safety of the state requires it. For example, in *Minnesota v. Probate Court*, *supra* at p. 275, legislation providing for the commitment of persons with psychopathic personalities was upheld. It is likewise not unusual for persons to be physically confined on other grounds related to the public welfare, as in the case of the confinement of jurors, of material witnesses, and of persons performing particular types of services, such as merchant seamen. See, for example, *Lively v. State*, 22 Okl. Cr. 271, 276-278; 211 Pac. 92, 94; *United States v. Von Bonim*, 24 Fed. Supp. 867 (SDNY); *State v. Nether-ton*, 128 Kan. 564, 279 Pac. 19; *Robertson v. Baldwin*, 165 U. S. 275; *Dinsman v. Wilkes*, 53 U. S. 390.

Similarly, even well persons may be excluded from areas within which epidemics are present, apparently on the theory that the entrance of the well persons would add fuel to the fire of the disease. *Compagnie Française v. Board of Health*, *supra*. On the question of reasonable interference with personal liberty compare the sex sterilization cases of *Skinner v. Oklahoma*, 316 U. S. 535 and *Buck v. Bell*, 274 U. S. 200.

Probably the cases presenting a factual situation most similar to that of the case at bar are cases such as the *Selective Draft Law Cases*, 245 U. S. 366, or *Local Board No. 1 v. Connors*, 124 F. (2d) 388 (C. C. A. 9)

holding that an individual may be required to serve in the armed forces of the United States in time of war or of a national emergency short of war.

Although we concede that the existence of a state of war does not of itself suspend the operation of the due process clause, it is absurd to argue that the military situation can be ignored in determining what is due process. Since the test of what infringement of personal liberty is permissible within the limits of the Fifth Amendment is essentially one of reasonableness, it is obvious that the test cannot be applied *in vacuo*, but the relevant facts must be considered. What can be justified in wartime may very well be unjustifiable in peacetime. For example, it might be different if the Federal Government in time of peace and as a matter of economic and social legislation evacuated the Japanese on the West Coast. On the other hand, as has been shown above, the possibility of a Japanese invasion requires that the individual rights of the persons affected give way to the public good. The existence of a state of war justifies restraints which would otherwise be invalid because "no adequate reason therefor in time of peace and domestic tranquillity exists". *Meyer v. Nebraska*, 262 U. S. 390, 402. When the necessity created by war requires, "Private rights, under such extreme and imperious circumstances, must give way for the time to the public good * * *". *United States v. Russell*, 13 Wall. 623, 629. See also *Block v. Hirsh*, 256 U. S. 135, 150-156; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; *Levy Leasing Co. v. Siegel*,

258 U. S. 242; *Chastleton Corp. v. Sinclair*, 264 U. S. 543; *Home Building & Loan Ass'n. v. Blaisdell*, 290 U. S. 398.

It is submitted that on the facts and the authorities cited it is clear that the exercise of the war powers here involved could not be condemned judicially as so capricious as to constitute a denial of due process of law. No reliance has been placed on the martial law group of cases involving the due process limitation on the exercise of war or similar powers (*Sterling v. Constantin*, 287 U. S. 378; *Moyer v. Peabody*, 212 U. S. 78) because it is believed that the constitutional question can be most clearly considered if it is demonstrated to the Court that the evacuation and curfew can be plainly sustained under the war powers without reference to or particular reliance on these authorities and if the opinion of the court below and the bearing of the martial law authorities, the most commonly misunderstood body of law, are considered separately (Point V below). But even though the absence of any restriction by due process on the exercise of the war power in this case to affect personal liberty can be established by other authorities (for example, the *Selective Draft Law Cases*) brief reference may be made here to the discussion of the relationship between due process and the exercise of the war powers or similar powers found in the martial law cases without placing any independent reliance on them at this point but using them as apt illustrations.

In *Sterling v. Constantin, supra*, holding that in the absence of any reasonable factual basis for the declaration of martial law by a State Governor due process warranted that he be enjoined from using the troops to regulate oil production in the state, the Court stated (p. 399):

The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.

In the earlier case of *Moyer v. Peabody, supra*, the Court held that after the Governor with reasonable grounds declared a state of insurrection the arrest and temporary detention of persons not charged with crime was not objectionable under the due process clause of the Fourteenth Amendment, at least "so long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off" (212 U. S. at p. 85).

Thus, under the Supreme Court rulings, the due process guarantee does not prevent a State Governor from exercising broad discretion in the application of military measures if such measures are directly related

to the maintenance of the peace, which is the permissible objective for the use of troops in peacetime. If measures taken by the President in wartime are related to the then permissible end of the achievement of military success, such measures must likewise be deemed valid if within the "range of honest judgment" and "conceived in good faith." While the breadth of discretion accorded to the Executive in *Peabody* and *Constantin* cases was premised on his use of troops as an emergency measure against persons engaged or threatening to engage in immediate physical violence, the existence of imminence of acts of physical violence by the persons against whom military action is taken cannot be the controlling factor with respect to the necessity for its use under conditions of modern warfare. The success of troops on the battlefield may be doomed to failure as a result of civilian cooperation with the enemy, either of a violent or non-violent sort; and attempts to deal with acts of cooperation either after the fact or when it has become clear that such acts are imminent may be completely futile. The military commander's discretion to take precautionary military measures must be at least as great when the survival of the country is at stake as when the peace is endangered by violence as envisaged in the *Constantin* and *Peabody* cases.

In this general connection the English practice and the English law is of interest. It must be apparent that the British respect for civil liberty is like ours and that even though England has no written constitution and, therefore, no due process clause, that

the concept that no person should be deprived of his liberty without due process of law is an inherent part of British constitutional law. Nevertheless, in the present military crisis the British Government has not hesitated to provide that British subjects might be detained at the discretion of the Secretary of State and that such detention is not reviewable in any court. This has not only been enacted, but has been sustained by the highest British courts. *Liversidge v. Anderson* [1942], 1 A. C. 206; *Greene v. Secretary of State For Home Affairs* [1942], 1 A. C. 284. In the *Liversidge* case Lord Macmillan stated in his opinion (p. 257):

At a time when it is the undoubted law of the land that a citizen may by conscription or requisition, be compelled to give up his life and all that he possesses for his country's cause, it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively minor precautions of detention.

Thus, since the exercise of both the Congressional and the executive war power under the particular circumstances is clearly reasonably necessary as a matter of the survival of the state, and since it clearly comes within the area of governmental conduct not prohibited by the due-process clause, appellants are not deprived of liberty without due process of law. Moreover, even if the reasonable nature of evacuation were not clearly demonstrable the courts would not undertake to review the military judgment which was exercised in the absence of an irrefutable showing by the appellants that the action taken was wholly capricious.

C. Evacuation and curfew were not unconstitutional discriminations based
on race

The appellants argue that the evacuation and curfew of "persons of Japanese ancestry, aliens and citizens" deprives them of equal protection of the laws in violation of the due process clause of the Fifth Amendment. The Government contends that the distinction based on Japanese ancestry in this situation does not deny any equal protection of the laws or due process of law in violation of the Constitution.

It is, of course, settled law that the due process clause of the Fifth Amendment does not forbid every governmental action which the equal protection clause of the Fourteenth Amendment would bar. *Helvering v. Lerner Stores Co.*, 314 U. S. 463, 468; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381; *Currin v. Wallace*, 306 U. S. 1, 14; *United States v. Carolene Products Co.*, 304 U. S. 144, 151; *Colgate v. Harvey*, 296 U. S. 404, 422-423; *Metropolitan Co. v. Brownell*, 294 U. S. 580, 584; *Sproles v. Binford*, 286 U. S. 374, 396; *Tax Commissioners v. Jackson*, 283 U. S. 527, 538; *Frost v. Corporation Commission*, 278 U. S. 515; *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 37; *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Rast v. Van Deman & Lewis*, 240 U. S. 342.

To succeed upon a claim of denial of equal protection of the laws by the federal government the appellants must establish that the discrimination is so shocking and arbitrary that it denies them due process of law under the Fifth Amendment. From what has been argued, it is submitted that it is clear that evacuation of persons of Japanese ancestry was not unrea-

sonable. But even assuming, *arguendo*, that the cases on equal protection against unfairly discriminatory state action are applicable to federal governmental action, a comparison of the leading cases relied on by the court below and by the appellants (*Yu Cong Eng v. Trinidad*, 271 U. S. 500; *Buchanan v. Warley*, 245 U. S. 60; *Yick Wo v. Hopkins*, 118 U. S. 356; but see *Ah Sin v. Wittman*, 198 U. S. 500; *Soon Hing v. Crowley*, 113 U. S. 703; *Wong Wai v. Williamson*, 103 Fed. 1 (N. D. Cal.)) with cases permitting a distinction between nationals of different countries or races on a reasonable basis (*Gong Lum v. Rice*, 275 U. S. 78; *Clarke v. Deckebach*, 274 U. S. 392; *Patson v. Pennsylvania*, 232 U. S. 138; *Plessy v. Ferguson*, 163 U. S. 537), makes it clear at once that this treatment of races based not on race prejudice but on a reasonable ground in the exercise of the war power is constitutional.

In *Clarke v. Deckebach*, *supra*, holding valid a municipal ordinance prohibiting the issuance of pool-room licenses to all aliens, the Court lucidly stated the difference between the two types of cases, as follows (p. 396):

The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, *Yick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; *In re Tiburcio Parrott*, 1 F. 481; *In re Ah Chong*, 2 F. 733; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, 12 Fed. Cas. No. 6,546; *Wong Wai v. Williamson*, 103

F. 1; *Fraser v. McConway & Torley Co.*, 82 F. 257, it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification, *Patson v. Pennsylvania*, 232 U. S. 138; *Crane v. New York*, 239 U. S. 195, 198; *Terrace v. Thompson*, 263 U. S. 197; *Porterfield v. Webb*, 263 U. S. 225; *Webb v. O'Brien*, 263 U. S. 313; *Frick v. Webb*, 263 U. S. 326; *Cockrill v. California*, 268 U. S. 258. Cf. *McCready v. Virginia*, 94 U. S. 391. [Italics supplied.]

The admitted allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this court took judicial notice in *Murphy v. California*, 225 U. S. 623. The regulation or even prohibition of the business is not forbidden. *Murphy v. California*, *supra*. The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences, and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies.

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. *Ft. Smith Light &*

Traction Co. v. Board of Improvement, ante, p. 387.

Some latitude must be allowed for the legislative appraisalment of local conditions, *Patterson v. Pennsylvania*, supra, 144; *Adams v. Milwaukee*, 228 U. S. 572, 583, and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods. See *Westfall v. United States*, Ante, p. 256.

In *Plessy v. Ferguson*, supra, upholding the constitutionality of a statutory provision requiring equal but separate accommodations for the white and colored races in public vehicles, the Court answered the objection that the states might extend the mandatory separation from schools and public vehicles to places of business or even to the streets, as follows (P. 550):

The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus, in *Yick Wo v. Hopkins*, 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco * * * was * * * a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. * * *

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.

Surely, in pursuit of such a primary and proper objective of government activities in time of war as the public safety of the West Coast area most subject to attack, it was reasonable for Congress, the Commander in Chief, and the other military authorities to conclude that persons likely to assist an attack by the Japanese forces would be found within the group of persons of Japanese ancestry rather than in the rest of the population. This distinction was not an invidious discrimination prompted by race prejudice and seeking an objective of such prejudice such as the denial of a common calling to a particular race without any rational difference between the relations of that race and the remainder of the population to that particular occupation (*Yick Wo v. Hopkins, supra*). In the present case, however, the war power of the Federal Government was exercised to secure the lawful and imperative objective of public safety and the distinction was based not on race prejudice but on military judgment seeking to deal with the group most likely to contain persons who would assist an attack by the Japanese military forces. It is a shorthand inaccuracy of expression to say that the distinction was based solely on race. Legally, it is more accurate to say that the distinction was based upon possible allegiance of some members of a group to the Japanese enemy in case of

an attack and the group was properly and reasonably described in terms of persons of Japanese ancestry. In other words, the distinction is based not on the mere fact that these persons were of Japanese ancestry but on the facts that such persons have cultural and family ties which render it likely that among them will be found the persons who would help this particular enemy which was likely to attack the area in which they resided.

That the distinction is not based on race alone is also indicated by the reflection that even if Japanese had succeeded in the attempt to establish that they were "free white persons," members of the white race, eligible for naturalization (*Ozawa v. United States*, 260 U. S. 178), the result here would be the same and such naturalized Japanese-American citizens would have been excluded because the distinction is not based on race alone but on possible enemy loyalties of some of the group. Similarly, if a white person had become a Japanese citizen certainly the curfew would have been applied to him as an "alien Japanese" (Proclamation No. 3) because the distinction is not based on race alone.

The appellants also apparently object to the classification on the ground that Italian and German alien enemies were not included (*Korematsu*, p. 95). The complete legal answer to that contention is that Congress may deal with one problem even though it does not extend its control to a similar problem or to include all possible objects of its regulation. *United States v. Carolene Products Co.*, 304 U. S. 144, 151.

The factual answer is that the danger to be apprehended on the West Coast was an attack by the Japanese enemy and the ties of the Japanese on the Coast, not the Germans and Italians, to that enemy.

The appellants also contend that it was unreasonable to evacuate them without individual hearings to determine who were disloyal. To what has been said concerning the impracticability of that course as a matter of fact (*supra*, 49), there may be added here the complete legal answer that the individual hearing required by due process in matters involving exercise of power in its nature judicial is, of course, not a prerequisite of the legislative and executive action here involved. *Clarke v. Deckebach*, *supra*, p. 66. Quarantines affect the healthy as well as the ill in the area affected without prior hearings to determine to which members of the groups the infection is limited or which members may be immune in themselves and as carriers of the disease. *Ex parte Caselli*, 62 Mont. 201; *Ex parte Johnson*, 40 Cal. App. 242; *Highland v. Schulte*, 123 Mich. 350; cf. *Lilz v. Hesterberg*, 211 U. S. 31.

Where a class as a whole is the proper object of official action a hearing of the individual is entirely irrelevant except to determine membership in the class. The operative fact on which the classification was made was not the loyalty or disloyalty of the individuals composing the class, but the danger of the existence of a group of over 100,000 persons of Japanese descent on the West Coast. "It does not follow that because a transaction (person in this case) separately considered is innocuous it may not be included in a prohibi-

tion the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." *Jacob Ruppert v. Caffey*, 251 U. S. 264, 291.

It is the central misapprehension of the argument for individual loyalty hearings to suppose that the action here was directed against persons on the basis of their loyalty. It is entirely irrelevant, therefore, to assert that the majority of the individuals evacuated were perfectly loyal citizens of the United States, as they are. The rationale of the action here in controversy is not the loyalty or disloyalty of individuals but the danger from the residence of the class as such within a vital military area. If there was a rational basis for this judgment of the military commander, then the only question that can be submitted to inquiry is whether a given individual was or was not a person of Japanese ancestry. And it is not contended that any mistake of fact was made on that issue.

It is submitted that the appellants have failed to establish any denial of due process of law in the evacuation and curfew requirement as applied to them in these cases.

IV. PUBLIC LAW 503 IS NOT INVALID BECAUSE OF ITS DELEGATION OF AUTHORITY TO THE MILITARY COMMANDER

It cannot be successfully contended that authorizing military commanders to fix the size of the military areas is a delegation of legislative power. *McKinley v. United States*, 249 U. S. 397. The objection must be that any primary standard is lacking

on the types of regulations authorized in the areas. The very fact, however, that the areas are to be *military* areas, in itself suggests a primary standard and that regulations appropriate to a military area, such as curfew and evacuation adopted in this case, are the regulations which are authorized. Moreover, the statute speaks expressly of entering, remaining in, leaving, or committing any act in any military area contrary to the regulations adopted for an area of such a character. Clearly one type of regulation contemplated by this is action of a kind related to leaving an area of a military character and evacuation is such a type of action applicable to a military area.

The appellants contend that Public Law 503 is invalid on the basis that it is an unconstitutional delegation of legislative power in that it does not circumscribe the executive discretion thereunder within sufficiently narrow limits. The Government contends that the words of the statute alone, and considered in connection with its legislative history and the nature of the power involved, the war power, establish that there is no delegation of purely legislative power. Moreover, it must be borne in mind that prior to the enactment of Public Law 503 on March 21, 1942, General DeWitt had issued, pursuant to Executive Order 9066, Public Proclamations Nos. 1 and 2 (on March 2 and March 16, respectively), which proclamations initiated the evacuation program. Each proclamation clearly indicated that persons would subsequently be excluded from the zones established by the proclamations. The evacuation program was at that time

a matter of public proclamation, public knowledge and discussion, including discussion involving members of Congress and representatives of the Government departments concerned. Under these circumstances, while Public Law 503 does not expressly mention the evacuation program, it may be interpreted as though "restrictions applicable to any such area or zone" to which it referred, meant restrictions imposed to effect the evacuation program.

Even assuming, however, that P. L. 503 were not to be construed as suggested above, it would nevertheless not constitute an unconstitutional delegation of power. The constitutionality of a delegation of Congressional power with respect to the prosecution of the war must be judged by a special standard rather than by that applicable to most Congressional powers, because in this field the Constitution itself grants powers to the President as well as to Congress. Corwin, *op. cit.* pp. 194-198. With respect to a similar sphere of action, the conduct of foreign relations, the Supreme Court discussed the question of Congressional delegation in the following terms:

It is important to bear in mind that we are here dealing not only with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be

exercised in subordination to the applicable provisions of the Constitution * * * congressional legislation which is to be made effective through negotiation and injury within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. * * * When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly define standards by which the President is to be governed * * *

United States v. Curtiss-Wright Corp., 299 U. S. 304, 319-322, 1936.³⁴

³⁴ In the decision, the Court pointed out the similarity of the power there at issue with the war power in the following passage: "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality" (299 U. S. at p. 318).

Similarly, in *Field v. Clark*, 143 U. S. 649, the Court, again dealing with the conduct of foreign relations, indicated that the nature of the delegated power was of major significance in determining the permissible scope of its delegation (143 U. S. at p. 691). The logic of the Court's approach in the *Curtiss-Wright* opinion is particularly applicable to the war power. For in view of the broad power which the Constitution itself grants to the President with respect to the prosecution of the war (*supra*, p. 34), there would be little rationality in Congress narrowly limiting the scope of the President's discretion when delegating war power to him.

Broad powers have habitually been granted to the President in wartime legislation, a fact which in itself is important in considering the constitutionality of the instant delegation (*Field v. Clark*, cited *supra* at p. 683). In one of the few cases in which the constitutionality of a war measure has been discussed from the standpoint of the extent of the delegation of power, the Court said:

The Act (respecting the disposition of alien enemies' property) went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander in Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. *United States v. Chemical Foundation*, 272 U. S. 1, 12.

Generally, in upholding war legislation conferring broad powers on the President, the Court has not con-

sidered it necessary to discuss the delegation question but has merely adverted to the cognate powers of the President and the Congress in the war-making field. In an early case, *The Thomas Gibbons*, 8 Cranch, 420, the Court dealt with a statute authorizing the President " 'to establish and order suitable instructions for the better governing and directing the conduct' of private armed vessels," under which the President had commissioned privately owned vessels and instructed their masters as to the capture of prize (8 Cranch at p. 426, 431). The Court said that it did "not think it necessary to consider how far he (the President) would be entitled, in his character of commander in chief * * * independent of any statute" to take such action because he was clearly authorized to take it by the statute. On this point, the Court held: "The language of this provision (quoted above) is very general, and in our opinion, it is entitled to a liberal construction, both upon the manifest intent of the legislature, and the ground of public policy" (8 Cranch, at p. 426).

The Court handled in similar fashion the broad delegations of Congressional power to the President in the Civil War and in the last World War. In *Hamilton v. Dillin*, 21 Wall. 73, the Court considered a statute which prohibited commercial intercourse between the citizens of the North and the South except insofar as the President permitted such intercourse and subject to the conditions imposed by him. The Court declared:

Whether, in the absence of Congressional action, the power of permitting partial inter-

course with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject * * *. But without pursuing this inquiry, and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject (21 Wall. at pp. 87, 88).

During the last World War a statute gave the President power "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable" (*Northern Pacific Railway Co. v. North Dakota, supra*). Without differentiating between the executive and legislative branches of the federal government, the Court gave effect to the statute on the basis of "the complete and undivided character of the war power of the United States" (205 U. S. at p. 149).

The case of *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, involved a similar statute, which authorized the President to assume control of any communication system "and to operate the same in such manner as may be needful or desirable for the dura-

tion of the war.” With respect to this delegation the Court merely said:

* * * That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the *North Dakota Railroad Rate Case (Northern Pacific Railway Co. v. North Dakota, supra)*. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him (p. 183).

In *Highland v. Russell Car Co.*, 279 U. S. 253, the Court considered a statute giving the President the power to fix the price of coal; after discussing the development of the regulatory program the Court said: “But this arrangement having failed to give assurance of an adequate supply, Congress and the President found it necessary to take the steps here involved . . . the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on” (279 U. S. at pp. 260, 261, 262).

In view of the doctrine of the *Curtiss-Wright* case, *supra*, the haziness of the line separating the executive and the legislative power with respect to the prosecution of the war, and the history of broad delegations of Congressional war power to the Presi-

dent, the authority delegated by Public Law 503 should not be considered to be unconstitutional.

V. EVACUATION AND CURFEW WERE NOT AN INVALID EXERCISE OF MARTIAL LAW

The court below apparently took the view that the evacuation and curfew constituted an exercise of the power of martial law; that "such power only is tolerated in the first instance if a state of 'martial law' has been proclaimed by the proper authority and in the ultimate only if the facts prove the existence of the military necessity therefor" (R. 30); that the failure to declare martial law strongly implies that there is no necessity for such action (R. 40); and that Congress might have declared martial law and thereupon the courts might have become adjuncts of the General Commanding but in its absence the court must apply ordinary law and protect the rights of a citizen in a criminal case and by such standards Congress could not constitutionally make a distinction based on Japanese ancestry (R. 44-45). The court below also states that any doctrine of partial martial law is unsound (R. 35) and that although Congress could declare martial law if the facts warranted such a declaration it could not in uninvaded loyal territory delegate to military commanders the power to make regulations having the effect of criminal laws.

The Government contends that if its view is correct, that this case plainly involves an exercise of the federal legislative and executive war powers which is not so arbitrary as to be prohibited by the Fifth Amendment, there is no need legally to consider the evacua-

tion and curfew in terms of the martial law decisions in the absence of any such decision indicating that the particular action taken, evacuation and curfew, was unlawful except under a state of facts in which the civil government had been wholly replaced by the military authorities. In other words, if the decisions on the war powers not discussing martial law sustain the action taken and if no decision involving martial law requires a contrary result, reliance on the martial law authorities is unnecessary. In view of the fact, however, that the court below treats this case entirely as a matter of martial law, and does not discuss the other war-power judicial authorities relied on by the Government, the martial-law authorities will also be considered.

An examination of the martial law decisions invariably results in the conclusion that the decisions disclose conflict and confusion (8 Ops. A. G. 365; Charles Fairman, *Law of Martial Rule and the National Emergency*, 55 H. L. R. 1253, 1258), which perhaps is not surprising as a matter of human nature in that they express views of the civil judiciary concerning military control usually superseding judicial functions against the background of the historical political traditions of democratic peoples who view with alarm the ascendancy of the military authorities in less democratic nations.³⁵

³⁵ Charles Fairman, also author of "The Law of Martial Rule" (1930), speaking of this general question, was reported by the San Francisco Chronicle for March 4, 1942 (p. 14), as follows:

"Probably the problem will only be confused by talking about martial law. The President has made no such proclamation, and

It is submitted, however, that the application of these decisions to this situation is clear if it is understood that the exercise of federal martial law in time of war (as distinguished from a State Governor's exercise of martial law to quell a local insurrection) is just one of the many types of exercise of the federal war power. Many of the exercises of the war power obviously have no relation to what is popularly thought of as martial law. For example, when, in time of peace, the Congress appropriates money for the construction of a battleship or a dam or for the support of the army, no one would think Congress had declared martial law. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288. On the other hand, the actions taken by the civil governor and by the military governor of the Territory of Hawaii following the attack of December 7, 1941, resulting in military custody of a citizen without trial, have been termed a valid exercise of martial law by this Court.

This difference of degree in the exercise of the war powers is a source of the conceptual confusion concerning martial law. Actually any exercise of the war power must, as has been shown above, be reasonably related to the military end sought and reasonably necessary to the achievement of that end. As the emergency becomes more grave, however, the scope of reasonable governmental conduct and even of military

if he did, his constitutional powers would not be increased one whit. The question in every case of military control would still be, can the action complained of be justified as apparently reasonable and appropriate, under the circumstances, to the defense of the nation and the prosecution of the war?"

conduct which is reasonable necessarily expands until finally, as some writers have put it, if the military situation actually requires it, the will of the general governs (Fairman, op. cit. 55 H. L. R. 1253, 1259).

Those exercises of the war power which involve the most drastic changes from governmental customs in times of peace have been, but need not be, termed exercises of martial law. *Sterling v. Constantin*, 287 U. S. 376; *Moyer v. Peabody*, 212 U. S. 78. The test for the validity of the exercise of martial law is identical to the test for the propriety of any exercise of the war power. An accepted definition of martial law is stated as follows, Wiener, "A Practical Manual Of Martial Law" (1940) p. 16.

Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed.

The fact that many exercises of the war power, such as the peacetime maintenance of military establishments, require no particular formal invocation of the war power and the fact that martial law customarily is formally declared either by the Chief Executive or a military commander supplies no basis for a distinction between the war power and martial law, because the proclamation of martial law is not necessary to its exercise but "must be regarded as the statement of an existing fact, rather than the legal creation of that fact." 8 Ops. A. G. 365, 374; Wiener, op. cit., pp. 19-20.

It is, therefore submitted that the fundamental question in the case at bar is whether the evacuation

program is, under all the circumstances, a proper exercise of the war power. It is unnecessary legally, and it may be undesirable generally, to decide the subsidiary question of terminology whether this particular exercise of the war power falls within that part of the scope of the war power which is popularly called martial law. On the one hand it is a substantial exercise of the war power over personal liberty and for that reason might possibly be called martial law. On the other hand it is not the type of control usually associated with martial law (*Ex parte Milligan*, 4 Wall. 2; *Zimmerman v. Walker*, decided by this Court December 14, 1942) and might be exercised by civilian authorities as is contemplated under the English statute and regulations (*supra*, p. 42) without making any reference to martial law. Indeed, in view of the fact that in popular opinion greater military control than here involved and suspension of the civil government including the courts is associated with the state of martial law, it might be more useful not to label the exercise of the war power here involved as martial law.³⁶

³⁶ The most recent example of the varying degrees of military control which may be exercised under martial law is contained in General Emmons' proclamation a few days ago providing that in Hawaii where martial law in all senses of the term prevails and the suspension of the writ of habeas corpus is continued, nevertheless full jurisdiction and authority are relinquished by the Commanding General to the Governor and other civilian officers in respect of numerous matters including the conduct of both criminal and civil proceedings with certain exceptions, censorship of the mails, and various governmental activities such as control of transportation, public health, and other matters.

Appellants argue that the evacuation program is necessarily that type of exercise of the war power which must be called martial law, and that martial law could not be declared on the Pacific Coast under the dictum of the *Milligan* case, *supra*. As this Court knows, the question in the *Milligan* case was whether Milligan could constitutionally be tried by a military commission at Indianapolis, Indiana, and sentenced to death. By the Act of March 3, 1863, 12 Stat. 755, Congress had expressly provided that the President might, in his judgment, suspend the privilege of the writ of habeas corpus, and provided further for the detention of political prisoners pending the next sitting of the federal grand jury. The Supreme Court unanimously held merely that the Executive was not entitled to try Milligan by military commission, because Congress had provided a method of dealing with disloyal persons and had not provided for trial by military commission.³⁷ Compare *United States ex rel. Quirin v. Cox*, United States Supreme Court October 29, 1942; 87 Law Ed. 1.

Conceding for the sake of the particular argument, that the further doctrine of the majority opinion has been so often quoted that it has come to be declaratory of the law, that opinion is distinguishable. The fac-

³⁷ The dissenting opinion in *Zimmerman v. Walker*, *supra*, states that the broader views of the majority of the Court in the *Milligan* case are not dicta because the Government had argued that Milligan could be detained whether or not authorized by Congress. It is respectfully submitted here that the Government's argument may indicate that the dicta were well considered but nevertheless they were dicta.

tual question with which the Court was there dealing was whether the military commander, in the exercise of the war power could, in an area not threatened by invasion or insurrection and in which the courts were functioning entirely normally, usurp the function of the courts and try Milligan before a military commission. The dictum of the majority states that even Congress could not do this. The majority opinion in the *Milligan* case certainly does not hold that an exercise of the war power totally unrelated to the functioning or the nonfunctioning of the courts is to be tested by that criterion. The issue there decided was stated succinctly as follows (at pp. 118-119):

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan * * * (was) arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission * * *. The power of punishment is alone thought the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment * * *.

The Court then declared that "every trial involves the exercise of judicial power"; that no part of the judicial power of the United States—which is vested "in the Supreme Court, and in such inferior courts as the Congress may * * * establish" by Article III, section 1 of the Constitution—was possessed by

the commission which tried Milligan; and that there was no sanction for Milligan's trial by a body which did not possess such judicial power when, in the State where he was tried, the "Courts (were) always open to hear criminal accusations" (4 Wall., at p. 121). The Court held that Milligan's trial was unconstitutional on the additional ground that under the Sixth Amendment to the Constitution "citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury in all criminal prosecutions" (4 Wall., at p. 123). Thus the rule of the *Milligan* case with respect to the significance of the uninterrupted functioning of the courts or the constitutionality of exercise of military power, was intended only to apply, and logically can only apply, in instances where the military forces assume civil judicial functions.

Although the *Milligan* case is not particularly relevant since neither opinion applies to the case at bar, it may be said that even the majority opinion precisely fits the theory of law which is here urged. As has been said repeatedly, the test of the exercise of the war power is reasonableness. This would appear to be eminently reasonable. Military necessity may require the detention of a person until the military crisis is over (*Moyer v. Peabody*, 212 U. S. 78), but this might be a sufficient military measure and it might not be necessary to impose a punishment which would endure after the termination of the military crisis (by the time Milligan's case reached the Supreme Court his sentence had been commuted to life imprisonment).

In fact, the majority opinion itself makes it abundantly clear that the majority believed that there was no military necessity for the action taken by the military in that case. At p. 122 it is said:

Why was he (Milligan) not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business and adjourned. It needed no bayonets to protect it and required no military aid to execute its judgments.

On p. 127 the majority said further:

It is difficult to see how the *safety* of the country required martial law in Indiana. [Emphasis by the Court.]

The minority opinion also makes clear that a large measure of the difference of opinion between the majority and the minority was as to whether the Congress could reasonably have determined that the public danger in Indiana was sufficiently great to warrant the legislation which the majority gratuitously stated Congress could not enact. At p. 140 it is said:

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress

to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety.

The Court then goes on to discuss those conditions prevailing in Indiana at the time of Milligan's arrest indicating danger to the public safety, and further states (at p. 140):

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of the military commission and for trial by that commission of persons engaged in conspiracy.

Thus it appears that much of the division of the court in that case was due to a different evaluation of the facts, and it is by no means clear that if all of the members of the court had found that military necessity required Milligan's trial by commission, any member of the court would have suggested that Congress lacked power to authorize such a trial.

Thus the military action tested in the *Milligan* case appears to have been in fact and in the opinion of the majority in excess of military necessity, arbitrary and unreasonable, and thus the majority opinion can be fitted precisely into the Government's theory of the law applicable to the case at bar.

The development of the English law also indicates that it is unnecessary to specify as a matter of terminology whether governmental control of liberty in time of war is martial law. The majority opinion

in the *Milligan* case appears to have been greatly influenced by the attitude in England that martial law cannot prevail where the civil courts are open expressed in connection with hostility towards severe military repression of revolts in Demerara and Jamaica. Fairman, op. cit. 55 H. L. R. 1253, 1254. By the time of the more serious national strife of the Boer War, however, the Judicial Committee of the Privy Council was prepared to abandon the doctrine that martial law may not obtain in areas in which the courts are open. *Ex parte Marais* (1902), A. C. 109. This view was affirmed in the cases arising during the Irish Rebellion. *The King v. Allen* (1921), 2 Ir. R. 241; *The King (Garde) v. Strickland* (1921), 2 Ir. R. 37; *The King (Ronayne and Mulcahy) v. Strickland* (1921), 2 Ir. R. 333. By the time of the present war, however, Parliament had gone beyond the concept of the necessity of formal martial law as a means of defense, and had provided in the Emergency Powers (Defense) Act (2 and 3 Geo. VI, c. 62 (1939)), extending the Defense of the Realm Act of the First World War (4 and 5 Geo. V, c. 29 (1914)), and conferring almost unlimited power on the executive. Under Section 18 (B) of the regulations under the Act the Secretary of State for Home Affairs is authorized to detain persons "with a view to preventing (the person detained) acting in a manner prejudicial to the safety or the defense of the Realm." The lawfulness of such a detention has been upheld by the House of Lords without reliance on martial law. *Liversidge v. Anderson* (1942), 1 A. C. 20. See

Carr, *A Regulated Liberty*, 42 Col. L. R. 339. The most striking parallel of British practice to the evacuation program is the regulations providing that the Secretary of State or the Admiralty might evacuate persons or classes from areas if it should appear necessary or expedient to do so for the purpose of meeting any actual or apprehended attack (*supra* 42). The significance of the British detention and evacuation regulations is that they are expressly to be imposed not by martial law, but merely by the ordinary civil executive authorities.

It is submitted that the court below erroneously viewed the problem as one in which, in the absence of a declaration of martial law replacing the ordinary functions of the civil government including the courts, the Congress and the President could not under the war powers order the evacuation and curfew. Whether or not this exercise of the war powers is termed an exercise of martial law, it was a reasonable exercise of the war power not prohibited by any specific clause of the Constitution and therefore is valid and constitutional.

VI. THE MISCELLANEOUS CONSTITUTIONAL OBJECTIONS RAISED BY THE APPELLANTS ARE WITHOUT MERIT

The appellants contend that Public Law 503 does not conform to the criteria established under the Fifth and Sixth Amendments with respect to the necessity for definite and certain standards of criminal conduct. The Government contends that whether or not the terms of the statute, standing alone, are sufficiently

definite to apprise the defendant of conduct made criminal thereby, the defendant has no valid constitutional objection if he had, prior to his commission of the offense, adequate guidance so that he could, if he chose, avoid unlawful conduct.

The regulations and orders authorized by the statute and violated by the appellants, define with minute particularity the conduct which is to be deemed criminal under the statute. In fact, the orders defining the conduct interdicted by Public Law 503 were so drawn, and given such publication, that no person in the area in which appellants resided could have escaped knowledge as to the precise physical movements that were lawful or criminal on his part. It is well established that the validity of a statute and indictment from the standpoint of certainty is to be judged not only by the terms of the statute but also by pertinent regulations or orders defining the offense. *Kay v. United States*, 303 U. S. 1, 8; *United States v. Shreveport Grain & El. Co.*, 287 U. S. 77; *International Harvester Co. v. Kentucky*, 234 U. S. 216.

United States v. Cohen Grocery Co., 255 U. S. 81 is not controlling because the statute merely stated "that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities" (255 U. S. at 89) and since this general language was not defined by regulation or order. Since the statute, as the Court said, did not forbid "any specific or definite act" (p. 89), the public was not informed, except in vague and indefinite terms, of the

type of conduct that was to be penalized. The holding that the defendant could not be held to answer for commission of a crime under such circumstances is clearly inapplicable in the instant case.³⁸

Very brief reference is believed to be sufficient for a few of the points raised. The constitutional prohibition of Bills of Attainder clearly has no application. The evacuation and curfew orders were precautionary measures and did not attempt, as appellant Hirabayashi suggests, to pronounce the persons affected thereby guilty of criminal conduct, either individually or collectively. "A Bill of Attainder is a legislative act which inflicts punishment without a judicial trial" for a past act which was not punishable at the time of its commission. *Cummings v. Missouri*, 4 Wall. 277, 323; *Ex parte Garland*, 4 Wall. 333, 377; *Pierce v. Carskadon*, 16 Wall. 234. As to the argument based on the prohibition of involuntary servitude, no order of detention is involved in the instant litigation; even if it were, the appellants have failed to note the Supreme Court decision with respect to this prohibition, in which it was stated: "The meaning of this is as

³⁸ The argument of the appellant Korematsu appears to confuse to some extent the question of delegation of power by a criminal statute with the question of the certainty with which criminal conduct must be defined. It is clear that where a delegation of legislative power would otherwise be valid, the fact that the statute employs a criminal sanction does not make the delegation unconstitutional. This was early affirmed in the case of *United States v. Grimaud*, 220 U. S. 506, and was recently reaffirmed in *Kay v. United States* (see *supra*), which cited the *Grimaud* case and *United States v. Shreveport Grain and El. Co.* (*supra*). On the same point, see *McKinley v. United States*, 249 U. S. 397.

clear as language can make it. The things denounced are slavery and involuntary servitude * * *. All understand by these terms a condition of enforced compulsory service of one to another." *Hodges v. United States*, 203 U. S. 1, 16. The prohibition of unreasonable searches and seizures applies to the physical action of breaking and entering a person's property or subjecting the property or the person to forcible search without that person's consent. The cases cited on this point by the appellants, which relate to the use of such seized material as evidence or the seizure of persons without warrant, show the inapplicability of this prohibition to the present case.

CONCLUSION

It is respectfully submitted that the judgments below in this case, and in the *Korematsu* and *Hirabayashi* cases, should be affirmed.

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APPENDIX

Declaration of War Between Japan and the United States:

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America:

Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That: The state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

Approved, December 8, 1941, 4:10 p. m.,
E. S. T.

[55 Stat. 795, 77th Cong. 1st Sess., c. 561.]

Public Law No. 503, 77th Congress (Section 97a, Title 18, U. S. C.):

Whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to

the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.

Wilful destruction of war or national-defense material (50 U. S. C. Secs. 104, 105):

§ 104. *Definition of national-defense terms.*—The words “national-defense material,” as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, food-stuffs, fuel, supplies, munitions, and all other other articles of whatever description and any part or ingredient thereof, intended for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

The words “national-defense premises,” as used herein, shall include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States.

The words “national defense utilities,” as used herein, shall include all railroads, railways, electric lines, roads of whatever description,

railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such national defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which water or gas may be furnished to any national defense premises or to the military or naval forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any national defense premises or to the military or naval forces of the United States. Apr. 20, 1918, c. 59, § 4, as added Nov. 30, 1940, c. 926, 54 Stat. 1220, amended Aug. 21, 1941, c. 388, 55 Stat. 655.

§ 105. *Destroying or injuring national defense materials, etc.*—Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, shall willfully injure or destroy, or shall attempt to so injure or destroy, any national defense material, national defense premises, or national defense utilities, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than ten years, or both. Apr. 20, 1918, c. 59, § 5, as added Nov. 30, 1940, c. 926, 54 Stat. 1220.

Executive Order No. 9066:

WHEREAS the successful prosecution of the war requires every possible protection against

espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appro-

priate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments, and other Federal Agencies to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

[United States Code Congressional Service, No. 2 (1942), p. 157.]

Executive Order No. 9102:

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is

necessary in the interests of national security, it is ordered as follows:

1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

3. In effectuating such program the Director shall have authority to—(a) Accomplish all necessary evacuation not undertaken by the Secretary of War or appropriate military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.

- (b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work in industry, commerce, agriculture, or public projects, prescribe the terms and conditions of such public employment, and safeguard the public interest in the private employment of such persons.

- (c) Secure the cooperation, assistance, or services of any governmental agency.

- (d) Prescribe regulations necessary or desirable to promote effective execution of such program, and, as a means of coordinating evacuation and relocation activities, consult with the Secretary of War with respect to regulations issued and measures taken by him.

- (e) Make such delegations of authority as he may deem necessary.

(f) Employ necessary personnel, and make such expenditures, including the making of loans and grants and the purchase of real property, as may be necessary, within the limits of such funds as may be made available to the Authority.

4. The Director shall consult with the United States Employment Service and other agencies on employment and other problems incident to activities under this order.

5. The Director shall cooperate with the Alien Property Custodian appointed pursuant to Executive Order No. 9095 of March 11, 1942, in formulating policies to govern the custody, management, and disposal by the Alien Property Custodian of property belonging to foreign nationals removed under this order or under Executive Order No. 9066 of February 19, 1942; and may assist all other persons removed under either of such Executive Orders in the management and disposal of their property.

6. Departments and agencies of the United States are directed to cooperate with and assist the Director in his activities hereunder. The Departments of War and Justice, under the direction of the Secretary of War and the Attorney General, respectively, shall insofar as consistent with the national interest provide such protective, police, and investigational services as the Director shall find necessary in connection with activities under this order.

7. There is established within the War Relocation Authority the War Relocation Work Corps. The Director shall provide, by general regulations, for the enlistment in such Corps, for the duration of the present war, of persons removed under this order or under Executive Order No. 9066 of February 19, 1942, and shall prescribe the terms and conditions of the work to be performed by such Corps, and the compensation to be paid.

8. There is established within the War Relocation Authority a Liaison Committee on War Relocation which shall consist of the Secretary of War, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Labor, the Federal Security Administrator, the Director of Civilian Defense, and the Alien Property Custodian, or their deputies, and such other persons or agencies as the Director may designate. The Liaison Committee shall meet at the call of the Director and shall assist him in his duties.

9. The Director shall keep the President informed with regard to the progress made in carrying out this order, and perform such related duties as the President may from time to time assign to him.

10. In order to avoid duplication of evacuation activities under this order and Executive Order No. 9066 of February 19, 1942, the Director shall not undertake any evacuation activities within Military areas designated under said Executive Order No. 9066, without the prior approval of the Secretary of War or the appropriate military commander.

11. This order does not limit the authority granted in Executive Order No. 8972 of December 12, 1941; Executive Order No. 9066 of February 19, 1942; Executive Order No. 9095 of March 11, 1942; Executive Proclamation No. 2525 of December 7, 1941; Executive Proclamation No. 2526 of December 8, 1941; Executive Proclamation No. 2527 of December 8, 1941; Executive Proclamation No. 2533 of December 29, 1941; or Executive Proclamation No. 2537 of January 14, 1942; nor does it limit the functions of the Federal Bureau of Investigation.

[United States Code Congressional Service, No. 3 (1942), p. 265.]

No. 10,317

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MINORU YASUI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE.

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CLERK

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MINORU YASUI,

VS.

UNITED STATES OF AMERICA,

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BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE.

The State of California, by leave of Court granted herein, files its brief as *amicus curiae* for the purpose of presenting its views upon some of the important legal questions raised by this appeal.

When the present case was before the Federal Court for the District of Oregon the State of California was permitted to file a brief as *amicus curiae*. The principal questions in that Court below concerned the authority of a Commanding General within a theatre of operations to impose for reasons of military necessity curfew hours upon persons of Japanese ancestry, and the validity of Public Law 503 (77th Cong., Ch. 191) under which the defendant was charged for violations of such orders.

INTEREST OF THE STATE OF CALIFORNIA.

The State of California is interested in the decision to be rendered on this appeal because:

1. Similar curfew regulations were adopted in California.

2. The decision would have a bearing upon the validity of the evacuation of persons of Japanese ancestry and other persons from the Western Defense Command in which California lies whose presence was deemed to be dangerous to the defense of the area.

3. The attack upon the power of the Commanding General to take these precautions for the defense of the Pacific Coastal zone challenges the authority of the Commanding General to institute dim-out, traffic, air raid and other measures of control which the defense of the State may require. Public Law 503, challenged herein as being unconstitutional, provides the sanction for the enforcement of these regulations.

4. A decision on these important questions would assist state and local law enforcement officers in co-operating with military and federal authorities.

5. If no authority exists under the circumstances by which such precautionary and preventive measures can be undertaken by the military authorities, the State of California will be faced with the problems which these measures were designed to meet. In some instances either statutory authority does not exist or constitutional limitations may prevent necessary action.

THE DECISION OF THE DISTRICT COURT.

The defendant, Minoru Yasui, was charged with having violated Public Law 503 (77th Cong., 2nd Sess., Ch. 191) in that, being a person of Japanese ancestry and residing within a prescribed military area, he failed to observe the curfew orders (Public Proclamation No. 3, March 24, 1942) issued by the Commanding General of the Western Defense Command and Fourth Army. (Tr. 2-6.) The trial Court, Judge James Alger Fee, found the defendant guilty 'as charged in the indictment. (Tr. 12.)

The defendant, born in the United States at Hood River, Oregon (Tr. 77), attacked the curfew proclamation of the Commanding General as unconstitutional upon the ground that as applied to American citizens of Japanese ancestry it was a discriminatory regulation based upon race and color alone, and that the curfew restrictions had been imposed upon him without due process of law. It was also charged that the curfew proclamation was not within the authority granted by Presidential Executive Order 9066. In support of these contentions it was argued that under the circumstances martial law powers could not be invoked to justify the proclamation. Public Law 503 was attacked on the ground that it improperly delegated to the President or to designated military commanders the power, first, to designate a military area or zone, and then to determine what acts should be prohibited therein. These in general are the arguments presented in similar cases now on appeal to this Court.¹

¹*Gordon Koyoshi Hirabayashi v. United States*, on appeal to CCA-9th, No. 10,308;

Fred Toyosaburo Korematsu v. United States, on appeal to CCA-9th, No. 10,248.

The Court below, while recognizing the danger and the need for action (Tr. 18, 19), held that the curfew regulations could not be enforced in a civil Court against Japanese who were American citizens because

(1) The issuance of regulations and making the violation of them a crime was a legislative function;

(2) A military commander has no such legislative power (Tr. 31);

(3) The Courts cannot enforce the regulations of a military commander (Tr. 43);

(4) Nor could Congress make criminal the violations of the regulations (Tr. 44);

(5) While such regulations could be issued under martial law, martial law cannot be validly established unless,

a. It has been formally established by proclamation (Tr. 40);

b. In a theatre of active military operations the Courts have been closed and civil government is no longer able to function (Tr. 39—adopting the test of necessity of the majority dictum in *Ex parte Milligan*, 4 Wall. 2, 127 (1866));

(6) Such regulations may be imposed upon aliens unrestrained by constitutional limitations (Tr. 45-46);

(7) The defendant, after gaining his majority, elected to be a subject of the Empire of Japan

and thus, as an enemy alien, the curfew regulations could be properly enforced against him in criminal proceedings in a Federal Court (Tr. 46-51);

(8) Congress could make criminal the violations of regulations to be issued by the commanding general with respect to enemy aliens. (Tr. 46.)

PURPOSE OF THIS BRIEF.

Because of the interest of the State of California in having stated the principles by which the President and his military commanders may exercise measures of control over civilians while California remains a theatre of operations, the State by this brief seeks to direct the Court's attention to that portion of Judge Fee's decision which deals with martial law and the validity of Public Law 503. It does not express any opinion on the judgment and finding that the defendant surrendered his right to American citizenship by electing to become a subject of Japan. This is essentially a matter of Federal concern, and one which should invoke the most serious consideration of this Court. Regardless of any question of the defendant's status as an enemy alien, the State believes that the regulations even as applied to the defendant as a citizen should be upheld as a valid exercise of martial law.

As the general propositions have already been discussed by counsel in the briefs on file in the cases of *Korematsu v. United States*, No. 10,248, and *Hira-*

bayashi v. United States, No. 10,308, and by the State of California in its brief in the latter case, this brief will be of most service if it deals briefly with the opinion of the trial Court as it applies to the fundamental question of the application of martial law to the problem at hand and to the validity of Public Law 503. The opinion also deserves attention because it is contrary to the other decisions of Federal District Courts which have held the curfew and evacuation orders to be enforceable.²

SUMMARY OF ARGUMENT.

I. Martial law is not, as the trial Court declares, the unrestrained will of the Commanding General. Being applied to persons in domestic territory, the Constitution and laws prevail. It cannot be exerted unless military necessity requires.

II. Martial law is part of our civil law—a consideration which undoubtedly would have caused the trial Court to reach a different conclusion. Controls exercised under martial law by the President, or his subordinate military commanders, are part of the constitutional war powers of the President. Military necessity must justify any limitation upon the constitutional and legal rights of individuals. This question of military necessity is reviewable by the civil Courts.

III. In today's total war, the military authorities in a theatre of operations must have the power to take

²Infra, p. 19.

precautions for the safety of the area and the successful prosecution of the war. The authority to act should not have to await the "utter necessity" required by the trial Court's decision, that is, the closure of the Courts and the deposition of the civil government by enemy action.

IV. Once the standard of military necessity is applied, a declaration of martial law should not be a prerequisite to its exercise. For the same reason, martial law may be limited to particular matters of military concern without assumption of complete control of the civil government.

V. The imposition of curfew hours by the military authorities is a proper measure of limited martial law. The privileges of individuals or groups must temporarily bend to the exercise of the right and power of the nation to defend and preserve itself.

VI. Public Law 503 is not invalid as an unconstitutional delegation of power. No legislative power is attempted to be delegated. The regulations are issued under the already existent martial law powers of the President and his military commanders. The Act merely provides a sanction for their enforcement in the Federal Courts. Neither is the law uncertain for it requires that a defendant must know, or should have known, the nature of the regulations and that his acts were in violation of them.

VII. In reviewing the validity of specific controls exercised by military authorities in time of war, the test should be whether or not the military authorities

have acted in good faith in view of the nature of the emergency and have abused the discretion which necessarily must be theirs in carrying out the defense of a particular area and conducting the war to a successful conclusion.

I. ANALYSIS OF THE TRIAL COURT'S DECISION WITH REFERENCE TO MARTIAL LAW.

A. Martial Law Confused With Military Government.

The trial Court held that the curfew regulations could not be applied to Japanese who were American citizens because martial law had not been declared, and martial law could be validly declared only when the civil Courts had been closed and the civil government deposed. Martial law, in the trial Court's opinion, is

“complete and represents the arbitrary will of the commander, controlled only by consideration of strategy, tactics and policy and subject only to the orders of the President. Under martial law the commander can seize men and hold them before a military commission for a violation of the laws of war or his own regulations. Finally, he can legislate and bind citizens and others by rules established by him and governing their conduct in the future.” (Tr. 32.)

This view that martial law is nothing more nor less than “the will of the commander” is entirely out of line with present-day concepts. It is a throw-back to

an early-day confusion between military law, military government and martial law.

Wiener, *Martial Law—What It Is and What It Is Not*, pp. 6-15—A Practical Manual of Martial Law (1940).

Actually, the trial Court is describing military government, not martial law. As Winthrop says in his "Military Law and Precedents":

"The often-quoted remark that martial law is simply 'the will of the general who commands the army' is a description much less apposite in practice to martial law proper or domestic martial law, than to that military government of enemies heretofore considered, and with reference to which in fact the observation was originally employed by Wellington.

"Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements. It may become requisite that it supersede for the time the existing civil institutions, but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction or materially restrict the liberty of the citizen; it may call upon him to perform special service or labor for the public defense, but otherwise usually leaves him to his ordinary avocation." (Reprint Edition, p. 820.)

Martial law is not alien to our law, but is part of it although an extraordinary part.

“Martial law insofar as it determines the scope and extent of military authority is a part of the law of the land, just as much as the law of contracts or of property. It is not an alien invader into our legal domain.” (Wiener, *A Practical Manual of Martial Law* (1940), p. 14.)

As our Supreme Court has said in the leading case of *Sterling v. Constantin*, 287 U. S. 378 (1932):

“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

Pollock, *Expansion of the Common Law*, pp. 105-106;

Chase, C. J., Concurring Opinion in *Ex parte Milligan*, 4 Wall. 2, 142 (1866).

Under military government, the power over persons in occupied territory is unlimited being subject only to the laws of war. Martial law, whether amounting to complete or partial control over persons in the United States, is limited by the constitution and the laws. The use of this power is always subject to judicial review. This Court recently in

Zimmerman v. Walker, CCA-9th, No. 10,093,
Dec. 14, 1942,

refuted the trial Court's concept of martial law by upholding the power of the military authorities in military areas in time of war to take the precautionary and preventive step of detaining suspected persons by pointing out that such martial law action when con-

needed with public necessity was within the framework of the Constitution.

“Measures like these are essential at times if our national life is to be preserved. When taken in the genuine interest of the public safety they are not without, but within, the framework of the constitution.” (p. 8.)

B. The Appropriate Test of Necessity.

It is understandable that having adopted the premise that martial law is the unrestrained will of the commander, the trial Court should next insist that such a type of control should not be recognized unless enemy action has closed the Courts and resulted in the disruption of civil authority. This is the view of the majority of five in its dictum in the *Milligan* case, *supra*.

This test of necessity might have fitted the state of military operations in the days of the Civil War. However, it is now all too evident that those charged with the common defense should not have to stand by until an invasion has deposed civil government or even until the bombs begin to fall before they may take action for our civilian defense. Undoubtedly judicial thinking will be brought in line with today's methods of total war. This is fully discussed in the *Hirabayashi* brief under the heading, “The Test of Necessity Should Be Consonant With Today's Military Problems”, page 21.

C. Must Martial Law Be Absolute or May It Be Limited to Particular Matters?

Having adopted the view that martial law is the arbitrary will of the commander, and can only exist when civil authority has been abrogated by enemy action the trial Court will not accept the view that the Commanding General may limit his control just to those certain matters pertaining to the defense of an area and leave undisturbed the courts and civil government. Hence the doctrine that martial law may be partial or qualified for the purpose of imposing dim-out, curfew or evacuation regulations was repudiated as a perversion of law and as being uncontrolled by law. (Tr. 34-35.)³ This view seems to spring from the Court's reaction to those attempts of State governors to misuse martial law powers. It is generally admitted that there has been a gross misuse of State troops in times of peace by governors in capital-labor disputes and in the settlement of political and economic controversies.⁴ However, the very cases of abuse cited show that martial law action is subject to the restraining force of the Constitution and the laws and that the courts will enjoin executives where it is apparent no military necessity exists.⁵

³"There is a pernicious doctrine known as 'partial martial law' which was developed by an ambitious governor as a method of dictating regulations to the people of a state uncontrolled by the Constitution or laws thereof." (Tr. 34.)

⁴These cases are sometimes referred to as instances of "bogus martial law". Wiener, *A Practical Manual of Martial Law*, pp. 160-169.

⁵For example,

Miller v. Rivers, 31 F. Supp. 540 (1940);

U. S. v. Phillips, 33 F. Supp. 261;

Hearon v. Calus, 178 S. C. 179, 183 S. E. 18 (1935);

Sterling v. Constantin, 287 U. S. 378 (1932).

The guiding principle of martial law is that

“Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed.” (Wiener, *A Practical Manual of Martial Law*, p. 16.)

Applying this test of military necessity, it would appear that martial law in most cases must be something less than the complete taking over of civil government.

In

Commonwealth ex rel. Wadsworth v. Shortall,
206 Pa. St. 165, 55 Atl. 952 (1903),

limited or qualified martial law was recognized.

“Order No. 39 was, as said, a declaration of qualified martial law. Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open, and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose, it was martial law, with all its powers. The government has and must have this power or perish. * * * It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important

enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war." (p. 954.)

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914)—"Martial law, however, is of all gradations";

In re Boyle (Idaho, 1899), 57 Pac. 706.

Another authority refuting the view of the trial Court is found in

Bishop, *New Criminal Law*, 8th Ed., Sec. 53 (1892),

which contains one of the best expressions of the principle:

"Martial law is elastic in its nature and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of civil authority; or its touch may be light, scarcely felt or not felt at all by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels."

Circuit Judge Haney, in his dissenting opinion in *Zimmerman v. Walker* (CCA-9, No. 10,093, Dec. 14, 1942), recognizes that the Commanding General has the power to act although complete governmental control is not assumed. Avoiding any particular test of necessity and realizing that it is the necessity and not a proclamation which generates the power the opinion asserts that the basic question is whether a particular action is deemed "reasonably necessary" to protect the nation against invasion.

“Whether a particular action is ‘necessary’ is a question of fact to be determined from proof of, among other things, the reason for the restriction, its purpose, and the improvement of methods and engines of war. What was not necessary a century ago, may be necessary today.” (p. 15.)

The opinion concludes by stating that the writ of habeas corpus (which was there sought against the military authorities in the Hawaiian Islands) should issue if the Court below finds the authority of the military was “reasonably necessary” to forestall invasion. With these conclusions the majority opinion would be in full accord.

D. Where Action Is Justified, a Proclamation of Martial Law Is Unnecessary.

A principal prop of the trial Court’s opinion is the assertion that martial law must first be proclaimed by Congress, the President, or by the Commanding General. (Tr. 40.) Today there seems to be general agreement that a proclamation of martial law is not a prerequisite before military authorities may exercise certain controls under their martial law powers. The fact is no proclamation is necessary. If the necessity exists to exercise military control in a particular manner, therein lies the justification. If the necessity and the occasion for the martial law are not present, words cannot give it life, nor if the necessity and occasion do exist is a proclamation necessary.⁶

Haney, J., dissent in *Zimmerman v. Walker*,
supra, p. 13.

⁶The matter has been well expressed by Professor Charles Fairman when he wrote with reference to President Roosevelt’s Execu-

In fact, even assuming that a proclamation is necessary, Proclamation No. 3 issued by Lieutenant General DeWitt (March 24, 1942, Tr. 68-73), imposing curfew hours upon the appellant and other persons of Japanese ancestry, provided the element of executive determination which Judge Fee would require before the Court should act to enforce the proclamation. (Tr. 42.)

II. CURFEW FOR PERSONS OF JAPANESE ANCESTRY IN PACIFIC COAST MILITARY AREAS WAS A PROPER MEASURE OF MARTIAL LAW.

It should be remembered that the companion cases here being considered involve the more drastic measures of evacuation. The instant case concerns the milder procedure of curfew. In an area of operations where there is a possibility that the civilian population will interfere with the defense of the area, the imposition of curfew restrictions is one of the most common practices of limited martial law. The measure is entirely precautionary. Where there is a danger of sabotage and espionage, such restraint upon the movements of persons considered to be disposed to assist the invader or to damage war industries or to convey

tive Order of February 19, 1942 (Executive Order 9066), under which Japanese-American citizens were removed from coastal areas:

“Probably the problem will only be confused by talking about martial law. The President has made no such proclamation and if he did his constitutional powers would not be increased one whit. The question in every case of military control would still be, can the action complained of be justified as apparently reasonable and appropriate, under the circumstances, to the defense of the nation and the prosecution of the war?” (*San Francisco Chronicle*, March 4, 1942, p. 14.)

military information to the enemy is not only proper but necessary to assure success in the present conflict.

The Court below fully recognizes the problems faced today by military commanders within a theatre of operation, and particularly does the Court point out that in view of the situation on the Pacific Coast persons of Japanese ancestry represented a reasonable classification for the regulations issued.

“The conditions and necessities of preparation for modern war had previously been recognized by this court. The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens, were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order.”
(Tr. 18, 19.)

The difference of opinion arises when the Court takes the position that the war power of the President and his subordinate military commanders is not extensive enough to authorize the adoption of curfew and other regulations for citizens in order to meet the danger. In view of the recognition that the presence of persons of Japanese ancestry on the coast created a military problem, it would appear upon the principles of martial law just reviewed that the curfew order as applied should be upheld.

The validity of curfew measures is also supported by those cases arising out of peace-time domestic disturbances where the Courts have upheld the power of the military to take the precautionary steps of detaining persons suspected of aiding the disturbances. (For a full discussion, see brief of State of California in *Hirabayashi v. United States*, No. 10,308, Point II, pp. 29-37.)

III. CONGRESS HAD THE POWER TO ENACT PUBLIC LAW 503 IN AID OF THE PRESIDENT'S POWER AS COMMANDER-IN-CHIEF AND OF HIS SUBORDINATE COMMANDING GENERALS TO MAKE RULES PERTAINING TO THE CONDUCT OF CIVILIANS IN PRESCRIBED MILITARY AREAS.

The Court below states that under Public Law 503, the commanding general was improperly delegated the power to legislate. (Tr. 31.) The power to adopt curfew and evacuation orders does not, under proper circumstances, require a delegation. The martial law powers of the President and his subordinate commanding generals to issue in time of war and in a theatre of operations regulations for the protection and defense of an area springs from the war power committed to the President under the Constitution.

“The decision in the principal case indicates that the war power is ample to permit the making and enforcing of regulations necessary to protect strategic military areas essential for national defense and that ‘in time of war a technical right of an individual should not be permitted to endanger all of the constitutional rights of the whole citi-

zenry'." (41 Mich. Law Rev. 525, December, 1942.)

For a full discussion of the question of delegation of power and the alleged uncertainty of the statute, see the brief filed by the State of California in the *Hirabayashi* case, pages 37-49.

IV. THE DECISIONS OF OTHER DISTRICT COURTS HAVE UPHELD THE VALIDITY OF THE CURFEW ORDERS.

The decision of the trial Court in the instant case is at odds with the other decisions involving the identical questions concerning the power of the President and the commanding general to issue either curfew or evacuation orders as applied to Japanese who are American citizens. These cases are discussed in the State of California's brief in the *Hirabayashi* case, pages 49-53.

V. EXTENT OF JUDICIAL REVIEW OF ACTS UNDER MARTIAL LAW.

The only feasible test to be applied here is whether or not the commanding general has acted arbitrarily and abused the discretion which should be allowed him in the carrying out of his duties. As the Supreme Court said in

⁷Reference is to the decision of the trial Court in *United States v. Hirabayashi*, USDC-WD (Wash.), No. 45,738, Sept. 15, 1942, which upheld the curfew orders here under review, as well as the evacuation orders as applied to citizens of Japanese ancestry.

Stewart v. Kahn, 11 Wall. 493 (1870):

“The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confined by the Constitution.”

A note

“Constitutional Law—Applicability of Curfew Regulations and Exclusion Orders to Persons of Japanese Ancestry” (41 Mich. L. R. 524, Dec., 1942),

discussing the trial Court’s decision in *United States v. Hirabayashi*⁸ and referring to the other decisions on the questions here under review says:

“The Court accepts the determination of the President as commander-in-chief and the military commander of the area that the measures here challenged are necessary to safeguard the Pacific coastal states from possible enemy attack, refusing to constitute itself a board of strategy to declare what is a necessary military area and what precautionary measures are to be taken. There would seem to be little question regarding the soundness of this position. If ‘The power to wage war is the power to wage war successfully’, it would seem essential that a certain measure of discretion as to the nature and extent of precautionary measures be given to those charged with national defense. It cannot well be argued that it is an unreasonable and wholly arbitrary assumption that among the large Japanese population residing in the Pacific coastal states there is sufficient

⁸USDC-WD (Wash.) ND, No. 45,738, Sept. 15, 1942.

disloyalty to require evacuation of all those of Japanese ancestry, citizens and aliens alike. When military areas are once established, certain constitutional rights of individuals therein, not absolute in and of themselves, must give way when in conflict with other rights granted for the protection, safety, and general welfare of the public." (p. 525.)

The matter of the extent of the Court's inquiry is further discussed in the brief of the State of California in the *Hirabayashi* case, pages 53-57.

CONCLUSION.

The concept that martial law represents, or must be, the complete and unrestrained control over civil government and the people in a military area is incorrect. However, due to the earlier confusion with other types of military control such is the idea in the minds of many laymen and some Courts. Actually today martial law merely means that in time of war and in strategic areas of the United States the military authorities may exert controls over persons which are deemed necessary for the defense and internal security of the area and for the successful carrying out of military operations. It should be made clear that martial law is part of our civil law, is limited by the Constitution, and is subject to review by our civil Courts. Refuting the idea that the review of action under martial law is not within the province of our civil Courts the Supreme Court has said:

“There is no such avenue of escape from the paramount authority of the Federal courts.” (*Sterling v. Constantin*, 287 U. S. 378, 398 (1932).)

But in applying the test of military necessity it will be obvious to the Court that the test of necessity suggested by the majority dictum in the *Milligan* case will not meet the stark realities of today's warfare.⁹ Under conditions of modern warfare it is increasingly clear that the military authorities here at home must have the power to exercise certain controls over civilians in strategic military areas for the protection of the people, the safeguarding of the war plants and utilities, and for the defense of the nation. This is particularly evident to the people of the State of California. No artificial test of the occasion when this power may be exercised should be adopted. Each particular action taken may be reviewed by the Courts to determine if within the range of honest judgment it can be said that the military authorities are guilty of an abuse of discretion in the carrying out of their military duties. It was entirely competent for Congress by the passage of Public Law 503 to provide a sanction enforceable in the Federal Courts for the carrying out of the curfew and other regulations adopted by the commanding general under his martial law powers. Daily it is being understood that in every phase of living our citizens, as groups and as individuals, must make sacrifices and submit to various controls in order

⁹“What was not necessary a century ago, may be necessary today.” Haney, J. in *Zimmerman v. Walker*, supra, p. 15.

that this war of survival may be successfully prosecuted. Any controls curtailing the rights of individuals exerted by the military will pass with the passing of the particular military necessity which called them forth—a promise not as capable of fulfillment when such controls are written into statutory law.¹⁰

Thus this Court is afforded the opportunity of dissolving the misconceptions concerning the use of martial law in time of war by the Federal military authorities and of stating clearly in terms of today's methods of warfare with particular reference to the situation in California and on the rest of the Pacific Coast the principles which will guide our military commanders and the authorities of the State of California in solving their mutual problems concerning the defense of the State and Nation.

Dated, San Francisco,
February 17, 1943.

Respectfully submitted,

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¹⁰The Court is respectfully referred to the conclusion in the brief filed by the State of California in *U. S. v. Hirabayashi* (supra, at page 57), for a statement of the guiding principles upon which it is believed that the decision in this case and in the companion cases should be written.

